Digest of United States Practice in International Law

2006

00-Cummins-Prelims.indd i 10/22/07 11:22:07 PM

00-Cummins-Prelims.indd ii 10/22/07 11:22:08 PM

Digest of United States Practice in International Law

2006

Sally J. Cummins
Editor

Office of the Legal Adviser
United States Department of State

OXFORD
UNIVERSITY PRESS

INTERNATIONAL LAW INSTITUTE

00-Cummins-Prelims.indd iii 10/22/07 11:22:08 PM

The *Digest of United States Practice in International Law* is co-published by Oxford University Press and the International Law Institute under agreement with the United States Department of State, Office of the Legal Adviser. The contents of the *Digest*, including selection of documents and preparation of editorial commentary, are entirely under the auspices of the Office of the Legal Adviser.

INTERNATIONAL LAW INSTITUTE

For fifty years the International Law Institute has addressed issues of interest to the international legal community through research, publishing, training, and technical assistance. For information on the activities of the Institute:

Publishing Office
International Law Institute
The Foundry Building
1055 Thomas Jefferson St., NW
Washington, DC 20007

202-247-6006
202-247-6010 (fax)
e-mail: pub@ili.org
Internet: www.ili.org

If you would like to be placed on Standing Order status for the *Digest of United States Practice in International Law*, whereby you will automatically receive and be billed for new annual volumes as they publish, please contact a Customer Service Representative.

In the United States, Canada, Mexico, Central and South America, contact:

Customer Service
Oxford University Press USA
2001 Evans Road
Cary, NC 27513
Email: custserv.us@oup.com
Phone (toll free in US): 1-866-445-8685
Phone (international customers): 1-919-677-0977
Fax: 1-919-677-1303

In the United Kingdom, Europe, and Rest of World, contact:

Customer Service
Oxford University Press
Saxon Way West, Corby
Northants, NN18 9ES
United Kingdom
Email: bookorders.uk@oup.com
Phone: +44 1536 741017
Fax: +44 1536 454518

The format and organization of this book are protected under copyright © by the International Law Institute, 2007. All rights reserved. No parts of the book may be reproduced, stored, or transmitted in any form or by any means, including mechanical, electronic, or photocopying without prior written permission from the International Law Institute. No claim to original U.S.Government works.

ISBN: 978-0-19-533948-2

Table of Contents

PREFACE xxiii

INTRODUCTION xxv

NOTE FROM THE EDITOR xxix

Chapter 1
NATIONALITY, CITIZENSHIP AND IMMIGRATION 1
A. NATIONALITY AND CITIZENSHIP 1
1. Statelessness 1
2. Determination of Citizenship in *In Vitro* Case 2
B. PASSPORTS 4
1. Western Hemisphere Travel Initiative 4
2. Passport Card 11
3. Electronic Passport 13
4. Limitations on Passports 15
a. Child support arrearages 15
b. Alleged collaboration with U.S.-designated terrorist group in foreign country 16
5. Lost and Stolen Passports 17
C. IMMIGRATION AND VISAS 18
1. Bases for Ineligibility 18
a. Material support to terrorist organization: Required decision 18
b. Illegal reentry 29
c. Conviction for aggravated felony 33
(1) Felony under state law only 33
(2) Retroactive application 36
2. Modifications in Procedures Related to Cuban Migrants 40
a. Family reunification 40
b. Medical personnel in third countries 41
3. Suspension of Entry Under INA Section 212(f) 42
4. Continued Detention of Un-admitted Alien Ordered Removed 45
5. Secure Fence Act and Comprehensive Immigration Reform 50

00-Cummins-Prelims.indd v 10/22/07 11:22:08 PM

D. REFUGEES AND ASYLUM 52
1. Refugees 52
a. Resettlement of certain Burmese refugees 52
(1) Karen refugees 53
(2) Chin refugees 55
b. Presidential determination and authorization for refugees in fiscal year 2007 55
c. Democratic People's Republic of Korea (North Korea) 56
d. Termination of Liberian eligibility for family reunification refugee admissions processing 59
2. Asylum: Uzbek Asylum Seekers 60
Cross References 61

Chapter 2
CONSULAR AND JUDICIAL ASSISTANCE AND RELATED ISSUES 63
A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE 63
1. Consular Notification 63
a. Suppression of evidence and change of procedural default rule as remedies for U.S. violation of obligation 63
b. Private right of action for money damages against law enforcement officials responsible for violation 75
(1) *Jogi v. Voges* 75
(2) *Cornejo v. San Diego* 86
c. Medellin 86
2. Consular Assistance 88
a. Deaths and estates 88
b. Bilateral treaties 88
B. CHILDREN 89
1. Adoption 89
a. Accreditation and approval 89
b. Certifications 95
c. Preservation of records and reporting 96
d. Consular officer procedures 98
2. Abduction 98
3. Parental Access 103
C. PRISONER ISSUES 104
D. JUDICIAL ASSISTANCE 105
1. Apostille 105
2. Russia: Letters Rogatory 107
Cross References 110

Chapter 3
INTERNATIONAL CRIMINAL LAW 111
A. EXTRADITION, MUTUAL LEGAL ASSISTANCE AND RELATED ISSUES 111
1. Treaties 111
a. Extradition treaties 111
(1) U.S.-UK extradition treaty 111
(i) Hearing before Senate Foreign Relations Committee 111
(ii) Questions for the record 114
(iii) SFRC report to the Senate and Senate advice and consent to ratification 122
(2) U.S.-EU extradition agreement 127
(3) Other bilateral extradition treaties 138
b. Mutual legal assistance treaties 139
(1) U.S.-EU mutual legal assistance agreement 139
(2) Other mutual legal assistance treaties 147
(i) Malaysia 147
(ii) Ratification of treaties with Germany and Japan 148
2. Judicial Reviewability of Secretary of State Decision to Extradite 148
a. *Mironescu v. Costner* 148
b. *Hoxha v. Levi* 156
3. Extradite or Prosecute 159
4. Renditions 160
a. Remarks by Legal Adviser 160
b. Litigation in U.S. courts 163
5. Cooperation with Eurojust in Criminal Enforcement Matters 163
B. INTERNATIONAL CRIMES 167
1. Terrorism 167
a. Country reports on terrorism 167
b. Access to airline passenger name record data 168
c. Countries not fully cooperating with U.S. antiterrorism efforts 172
d. State sponsors of terrorism 173
(1) Designations and rescission 173
(2) Implementing regulations 177
e. U.S. actions against support for terrorists 180
(1) Litigation 180
(i) *United States v. Afshari* 180
(ii) *Humanitarian Law Project v. Gonzales* 180

(iii) *Humanitarian Law Project v. U.S. Department of the Treasury* 183
(iv) *Kahane Chai v. Department of State* 191
(2) 1624 Report 199
(3) New sanctions 210
f. UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 211
2. Genocide, War Crimes, and Crimes Against Humanity 212
3. Narcotrafficking 212
a. Counternarcotics certification 212
b. International production and trafficking of methamphetamine 216
c. Designations under the Kingpin Act 220
d. Litigation related to 1971 UN Convention on Psychotropic Substances 221
e. Drug interdiction assistance 225
4. Trafficking in Persons 226
a. Trafficking in persons reports 226
b. Presidential determination 227
5. Corruption 229
a. UN Convention Against Corruption 229
b. National Strategy Against High-Level Corruption 234
c. Inter-American Convention Against Corruption 237
6. Cybercrime 239
7. Money Laundering 241
a. Identification of jurisdictions of primary concern 241
b. Imposition of sanctions on foreign financial institutions 243
(1) Final rule: Commercial Bank of Syria 243
(2) Final rule: VEF Banka 249
(3) Withdrawal of finding: Multibanka 253
c. Statutory amendment 254
C. INTERNATIONAL CRIMINAL TRIBUNALS AND RELATED ISSUES 254
1. Ad Hoc Criminal Tribunals and Related Issues 254
a. Overview 254
b. International Criminal Tribunal for the former Yugoslavia 259
c. Iraqi High Tribunal 269
d. Lebanon: Tribunal of an international character 272
e. Special Court for Sierra Leone 275

2. International Criminal Court 277
a. Provision of military assistance 278
(1) Waivers 278
(2) Statutory amendment 279
b. Economic Support Fund 279
Cross References 279

Chapter 4
TREATY AFFAIRS 281
A. CAPACITY TO MAKE 281
Unilateral Acts of States 281
B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION 283
1. Conclusion 283
2. Interpretation 284
a. In context of ICCPR 284
b. Role of *travaux préparatoires* 287
3. Reservations 288
a. International Convention for the Suppression of Terrorist Bombings 288
(1) Military exception 288
(2) Extradition and mutual legal assistance 290
b. Athens Convention 292
c. Issues addressed by the International Law Commission 294
(1) Reservations to treaties 294
(2) Effect of armed conflicts on treaties 295
4. U.S. Treaty Affairs Regulations 295
5. Treaty Affairs Webpage 298
Cross References 298

Chapter 5
FOREIGN RELATIONS 301
A. FOREIGN RELATIONS LAW OF THE UNITED STATES 301
1. Status of Coalition Provisional Authority 301
2. Presidential Signing Statements 305
3. U.S. Sovereign Immunity in Foreign Relations Context 307
a. Passport-related 307
b. Foreign service officer in line of duty abroad 308

B. CONSTITUENT ENTITIES 311
1. Status of Puerto Rico 311
2. Commonwealth of the Northern Mariana Islands: Claim to Submerged Lands 315
3. Republic of the Marshall Islands 316
Cross References 325

Chapter 6
HUMAN RIGHTS 327
A. GENERAL 327
1. Human Rights Reports 327
2. Human Rights Council 328
a. Establishment 328
b. U.S. statements 328
(1) Composition and procedures 328
(2) Special sessions 335
(i) Occupied Palestinian Territories 335
(ii) Lebanon 338
(iii) Darfur 340
c. Universal periodic review 341
d. Mandate review, expert advice and complaint procedure 341
3. Cuba 343
4. U.S. Implementation of the International Covenant on Civil and Political Rights before the UN Committee on Human Rights 346
a. Committee consideration 346
b. U.S. written responses to committee questions 350
B. DISCRIMINATION 371
1. Race 371
2. Gender 372
a. Support for UN Development Fund for Women 372
b. Advancement of women 373
c. Violence against women 374
(1) Human Rights Council report 374
(2) UN General Assembly resolution 375
3. Religion 376
a. Report on International Religious Freedom and designations of countries of particular concern 376
b. UN General Assembly: Interreligious and cultural dialogue 379

c. UN Human Rights Council: Religious freedom and freedom of expression 380
4. Disabilities 382
C. CHILDREN 384
1. Sale of Children, Child Prostitution and Child Pornography 384
2. Rights of the Child 385
3. Children in Armed Conflict 387
D. ECONOMIC, SOCIAL AND CULTURAL ISSUES 389
E. INDIGENOUS PEOPLE 394
F. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 401
1. Speech to Royal Institute of International Affairs 401
2. U.S. Implementation of Convention Against Torture 403
a. Committee consideration 403
b. Responses to further questions 409
3. Statement to Human Rights Council 421
4. Indictment Under U.S. Antitorture Law 422
G. GENOCIDE, CRIMES AGAINST HUMANITY AND RELATED ISSUES 422
H. DETENTIONS AND MISSING PERSONS 424
1. Disappearances 424
a. Draft convention on enforced disappearances 424
b. Working Group on Enforced and Involuntary Disappearances 428
2. Arbitrary Detention 429
I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES 430
1. Alien Tort Statute 431
a. *Sarei v. Rio Tinto* 431
(1) Ninth Circuit decision 431
(2) U.S. amicus brief in support of petition for rehearing 436
b. *Mujica v. Occidental Petroleum Corporation* 450
c. *Bancoult v. McNamara* 455
d. *Presbyterian Church of Sudan v. Talisman* 460
e. *Matar v. Dichter:* No cause of action 465
f. Legal Adviser letters 476
2. Torture Victim Protection Act 479
a. No cause of action 479
b. Exhaustion requirement: Futility 482
c. Failure to meet statutory requirements 484

J. RULE OF LAW AND DEMOCRACY PROMOTION 486
K. HUMAN RIGHTS AND COUNTER-TERRORISM 487
Cross References 488

Chapter 7
INTERNATIONAL ORGANIZATIONS 489
A. UNITED NATIONS: SECURITY COUNCIL 489
1. Reform 489
2. Jurisdiction 490
B. OTHER ISSUES 491
1. Responsibility of International Organizations 491
2. International Coffee Organization Reforms 493
3. International Mobile Satellite Organization: Amendment Concerning Function 494
Cross References 497

Chapter 8
INTERNATIONAL CLAIMS AND STATE RESPONSIBILITY 499
A. GOVERNMENT-TO-GOVERNMENT CLAIMS 499
1. Diplomatic Protection 499
2. U.S.-Albania Claims Settlement Agreement 502
B. CLAIMS OF INDIVIDUALS 504
1. Nazi Era Claims 504
a. *Freund v. France* 504
b. *Gross v. German Foundation Industrial Initiative* 507
c. *Mandowsky v. Dresdner Bank, AG* 517
2. Agent Orange Litigation 522
Cross References 526

Chapter 9
DIPLOMATIC RELATIONS, SUCCESSION AND CONTINUITY OF STATES 527
A. ESTABLISHMENT OF U.S. DIPLOMATIC POSTS 527
1. Libya 527
2. Monaco 528
3. Montenegro 528
4. San Marino 529

B. EXECUTIVE BRANCH CONSTITUTIONAL AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORTS 530
1. D.C. Circuit Court of Appeals Opinion 530
2. U.S. Submissions 533

Chapter 10
IMMUNITIES AND RELATED ISSUES 549
A. SOVEREIGN IMMUNITY 549
1. Foreign Sovereign Immunities Act 549
a. Scope of Application 550
(1) Definition of foreign state 550
(i) Organ of foreign state: *Powerex Corp. v. Reliant Energy Services* 550
(ii) Core functions test: *Garb v. Poland* 558
(2) Default judgments 562
(3) Waiver: *Af-Cap, Inc. v. Republic of Congo* 562
(4) Third-party assertion of immunity: *Rubin v. Iran* 564
b. Exceptions to immunity under the FSIA 572
(1) Commercial activity: *Garb v. Poland* 572
(2) Expropriations: *Garb v. Poland* 572
(3) Certain acts of terrorism 577
(i) Sudan: *Owens v. Sudan* 578
(ii) Iran: *Heiser v. Iran* 581
(iii) Iraq: *Vine v. Republic of Iraq* 584
(4) Rights in immovable property: *City of New York v. Permanent Mission of India* 592
c. Contempt sanctions: *Af-Cap v. Congo* 603
d. Collection of judgments 612
(1) Attachment of property belonging to a foreign state: *Ministry of Defense v. Elahi* 612
(2) Presumption of immunity for foreign state property: *Rubin v. Iran* 621
(3) Attachment of diplomatic properties: *FG Hemisphere Associates, LLC v. Democratic Republic of Congo* 621
(i) Excusable neglect 621
(ii) Immunity from attachment under FSIA 626
2. Immunity of Foreign Officials For Official Acts 629

B. HEAD OF STATE IMMUNITY 652
C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES 653
1. Immunity of Diplomatic Agent, Recognition by Receiving State: *United States v. Kuznetsov* 653
2. Immunity of Diplomatic Properties 658
3. Immunity of Members of Special (Ad Hoc) and Permanent Diplomatic Missions 662
4. Inviolability 681
D. INTERNATIONAL ORGANIZATIONS 682
1. International Telecommunications Union 682
2. Holy See and African Union 684
Cross References 684

Chapter 11
TRADE, COMMERCIAL RELATIONS, INVESTMENT, AND TRANSPORTATION 685
A. TRANSPORTATION BY AIR 685
Actual Control of U.S. Air Carriers 685
B. NORTH AMERICAN FREE TRADE AGREEMENT 686
1. NAFTA Free Trade Commission Joint Statement 686
2. Investment Dispute Settlement under Chapter 11 688
a. *Grand River Enterprises Six Nations, Ltd. v. United States of America* 688
b. *In Re NAFTA Chapter 11/UNCITRAL Cattle Cases* 693
c. Softwood Lumber Consolidated Proceeding 702
d. *Glamis Gold, Ltd. v. United States of America* 709
3. Litigation Challenging Constitutionality of NAFTA Binational Panel Review Provisions 726
C. WORLD TRADE ORGANIZATION 737
1. Dispute Settlement 737
a. WTO Disputes brought by the United States 737
(1) European Communities—Measures affecting the approval and marketing of biotech products (DS291, DS292 and DS293) 737
(2) European Communities—Selected customs matters (DS315) 739
(3) China—Measures affecting imports of automobile parts (DS340) 741
(4) Turkey—Measures affecting the importation of rice (WT/DS334) 742

b. WTO disputes brought against the United States 743
(1) United States—Measures relating to zeroing and sunset reviews (DS322) 743
(2) United States—Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA")(DS217/234) 744
(3) United States—Final countervailing duty determination with respect to certain softwood lumber from Canada (DS257); Final dumping determination on softwood lumber from Canada (DS264); Investigation of the U.S. International Trade Commission in softwood lumber from Canada (DS277); and Reviews of countervailing duty on softwood lumber from Canada (DS311) 745
2. WTO Accession 745
a. Ukraine 745
b. Vietnam 748
c. Russia 751
3. Doha Development Agenda 753
D. OTHER TRADE AGREEMENTS AND RELATED ISSUES 754
1. U.S.-EU Agreements 754
a. Agricultural and industrial products 754
b. Services 755
c. Wine 757
2. U.S.-Mexico 757
a. Tequila 757
b. Cement 758
3. Trade and Investment Instruments 759
a. Mauritius 759
b. ASEAN 760
c. Other TIFAs 761
d. Switzerland 761
4. U.S.-Canada Agreement on Softwood Lumber Trade 762
5. Free Trade Agreements 763
a. Central America-Dominican Republic Free Trade Agreement 764
b. Colombia 764
c. Panama 765
d. Implementation of agreements with Bahrain and Oman 765
e. Other developments 766
f. Special 301 program 766

E. COMMUNICATIONS 769
1. Global Internet Freedom Task Force 769
2. Amendments to the Constitution and Convention of the International Telecommunication Union 770
F. OTHER ISSUES 774
1. Foreign Investment: Committee on Foreign Investment in the United States 774
2. Intellectual Property 780
a. Patent law treaty 780
b. Agreement on international registration of industrial designs 786
3. U.S.-Uruguay Bilateral Investment Treaty 790
4. Cuban Trademark Litigation 796
5. U.S.-Indonesia Illegal Logging Initiative 801
Cross References 803

Chapter 12
TERRITORIAL REGIMES AND RELATED ISSUES 805
A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES 805
1. Freedom of Navigation 805
a. Oceans and the law of the sea 805
b. Straits 806
(1) Malacca and Singapore 806
(2) Torres Strait: Pilotage 810
c. Swedish territorial waters 812
d. Canadian maritime Arctic claims 814
2. Draft Convention on Wreck Removal 815
3. Maritime Labor Convention 2006 821
4. Guidelines for the Fair Treatment of Seafarers in the Event of a Maritime Accident 825
5. Salvage at Sea 828
6. Long-Range Identification and Tracking of Ships 835
7. Operational Procedures for Boarding and Inspecting Certain Vessels 838
B. OUTER SPACE 840
1. U.S. National Space Policy 840
2. UN Committee on Peaceful Uses of Outer Space 847
a. Recent U.S. activities 847
b. Registration of space objects 849
Cross Reference 851

Chapter 13
ENVIRONMENT AND OTHER TRANSNATIONAL SCIENTIFIC ISSUES 853
A. ENVIRONMENT 853
1. Pollution and Related Issues 853
a. Climate change 853
b. Transboundary water pollution: Teck Cominco 855
(1) Litigation in U.S. courts 855
(2) U.S.-Canada agreement 859
c. Comments on Report of the International Law Commission 861
(1) Transboundary harm arising out of hazardous activities 861
(2) Shared natural resources 862
d. Basel Convention on hazardous waste 863
e. Chemicals management declaration and strategy 865
f. Protection of stratospheric ozone 866
g. Emissions controls 871
2. Protection of the Marine Environment and Marine Conservation 872
a. Northwestern Hawaiian Islands Marine National Monument 872
b. Marine wildlife 875
(1) Pacific Salmon Treaty 875
(2) Whaling 878
(3) Sustainable fisheries 880
(i) UN Fish Stocks Agreement Review Conference 880
(ii) Sustainable fisheries resolution 880
(4) Sea turtle conservation and shrimp imports 882
(5) Dolphin-safe tuna fishing 883
(6) Pollock resources in the Central Bering Sea 885
3. Forests: Debt-for-Nature Agreements 886
4. Biological Diversity 888
B. MEDICAL AND HEALTH ISSUES 889
1. Pandemic Influenza: Implementation of U.S. National Strategy 889
2. International Health Regulations 891
C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES 893
International Fusion Energy Organization 893
Cross Reference 895

Chapter 14
EDUCATIONAL AND CULTURAL ISSUES 897
A. CULTURAL PROPERTY: IMPORT RESTRICTIONS 897
1. Colombia 897
2. Cyprus 899
3. Bolivia 901
4. Italy 901
Cross References 902

Chapter 15
PRIVATE INTERNATIONAL LAW 903
A. COMMERCIAL LAW 903
1. Carriage of Goods By Sea 903
a. Carriage of Goods By Sea Convention 903
(1) Overview 903
(2) U.S. submissions 913
(i) Seventeenth session of Working Group III 913
(ii) Eighteenth session of Working Group III 916
b. Carriage of Goods by Sea Act 918
2. Commercial Law Initiatives Relevant to Development Policies 928
3. UNIDROIT Mobile Equipment Convention: Draft Space Assets Protocol 931
4. Electronic Commerce 934
5. Securities Held Through Intermediaries 936
B. FAMILY LAW 938
1. International Enforcement of Maintenance Obligations 938
Draft Convention for the International Recovery of Child Support and Other Forms of Family Maintenance 938
2. Reciprocating Countries for Enforcement of Family Support Obligations 942
C. INTERNATIONAL CIVIL LITIGATION 944
1. Concurrent Proceedings in Foreign Courts 944
a. Comity-based abstentions 944
(1) *Mujica v. Occidental Petroleum Corp.* 944
(2) *Sarei v. Rio Tinto* 946

(3) *Royal and Sun Alliance Insurance Company of Canada v. Century International* 950
b. Anti-suit injunctions 953
(1) *E. & J. Gallo Winery v. Andina Licores, S.A.* 953
(2) *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.* 958
2. *Forum Non Conveniens* 963
3. Gathering Evidence Abroad 966
a. *Lopes v. Lopes* 966
b. Judicial assistance requests by Microsoft Corporation 969
4. Service of Process Abroad: *BP Products North America, Inc. v. Dagra* 970
Cross References 973

Chapter 16
SANCTIONS 975
A. IMPOSITION OF SANCTIONS 975
1. Sudan 975
a. Expansion of National Emergency 975
b. Darfur Peace and Accountability Act of 2006 978
2. Belarus 983
3. Syria 984
4. Iran 986
5. Palestinian Authority 990
a. Revisions to terrorism-related regulations 990
b. Palestinian Anti-Terrorism Act of 2006 993
6. Cote d'Ivoire 995
7. Democratic Republic of the Congo 996
8. Cuba 998
B. OTHER ISSUES 999
1. Terrorism 999
2. Procedures for Listing and De-listing Designated Individuals and Entities 1000
3. Challenges to Sanctions in U.S. Courts 1006
a. Denial of license to renew trademark by Cuban company 1006
b. Sanctions on travel to Iraq implementing UN Security Council resolution 1015
Cross References 1019

Chapter 17
INTERNATIONAL CONFLICT RESOLUTION AND AVOIDANCE 1021
A. PEACE PROCESS AND RELATED ISSUES 1021
1. Peaceful Settlement of Disputes: International Court of Justice 1021
2. Israel and the Palestinian Authority 1026
a. President's address to UN General Assembly 1026
b. Palestinian Authority Legislative Council elections 1028
c. Outbreak of renewed hostilities 1032
(1) Security Council 1032
(2) UN General Assembly 1033
3. Israel and Lebanon 1034
4. Sudan: Darfur 1042
5. Ethiopia-Eritrea 1055
6. Placement of Burma on Security Council Agenda 1058
7. Conflict Diamonds 1060
B. PEACEKEEPING AND RELATED ISSUES 1060
1. Lebanon 1060
2. Somalia 1061
3. Sudan 1064
4. Western Sahara 1064
5. Code of Conduct 1065
Cross References 1068

Chapter 18
USE OF FORCE, ARMS CONTROL AND DISARMAMENT, AND NONPROLIFERATION 1069
A. USE OF FORCE 1069
1. U.S. Response to International Committee of the Red Cross Study on Customary International Humanitarian Law 1069
2. Convention on Conventional Weapons 1085
a. Third Review Conference 1085
b. Transmittal of CCW instruments for advice and consent to ratification 1094
(1) CCW Amendment 1095
(2) CCW Protocol V 1097
3. Additional Distinctive Emblem 1100
4. Detainees 1104
a. Overview 1104

b. U.S. submissions to the United Nations relating to detainees 1117
(1) Response to Report of Rapporteurs on Guantanamo 1117
(2) U.S. Report to Committee Against Torture 1124
c. Military commissions and detainee treatment 1138
(1) Supreme Court decision in *Hamdan v. Rumsfeld* 1138
(2) Subsequent executive and congressional actions 1155
(i) Department of Defense statement 1155
(ii) President's statement on transfer of certain detainees to Guantanamo and need for military commission legislation 1156
(iii) Updated military guidance 1163
(iv) Military Commissions Act 1168
d. Further litigation related to Guantanamo detainees 1177
(1) Unlawful enemy combatants 1177
(i) *Hamdan v. Rumsfeld* 1177
(ii) *Boumediene v. United States* 1179
(2) Individuals determined to be no longer enemy combatants 1184
e. Other detainee litigation 1194
(1) Multinational Force-Iraq detainees: Challenges to transfers to Iraqi government 1194
(i) *Omar v. Harvey* 1195
(ii) *Mohammed v. Harvey* 1205
(2) Freedom of Information Act Cases 1213
(i) *American Civil Liberties Union v. Department of Defense* 1213
(ii) *Associated Press v. Department of Defense* 1218
5. Riot Control Agents 1223
6. Israel-Lebanon 1225
7. Israel-Palestinian Authority 1233
8. Iraq 1235
B. ARMS CONTROL AND DISARMAMENT 1238
1. Biological Weapons Convention 1238
2. Chemical Weapons Convention 1243
a. Extension of deadline for complete destruction of chemical weapons stocks 1243
b. National implementation measures 1246
c. U.S. implementing regulations 1249
3. Strategic Arms Reduction Treaty 1251

C. NONPROLIFERATION 1255
1. U.S. Compliance with International Law on Nuclear Weapons 1255
2. Country-Specific Issues 1265
a. Democratic People's Republic of Korea 1265
(1) Launch of ballistic missiles 1265
(2) Nuclear test 1268
(3) U.S. sanctions 1271
(4) Six-party talks 1271
b. Iran 1272
(1) IAEA report to the Security Council 1272
(2) Security Council and other international actions 1274
c. India: Implementation of 2005 India-U.S. Joint Statement 1284
(1) Identifying and separating civilian and military nuclear facilities and programs in India 1284
(2) U.S. legislation 1284
d. Russia 1287
3. Multilateral Efforts 1288
a. Proliferation Security Initiative 1288
b. Fissile material cut-off treaty 1289
c. Multilateral mechanism for reliable access to nuclear fuel 1292
d. Global Initiative to Combat Nuclear Terrorism 1293
4. Other U.S. Legislative and Regulatory Measures 1296
a. Implementation of U.S. Additional Protocol 1296
b. Weapons of mass destruction 1297
c. Other sanctions 1298
(1) Iran Nonproliferation Act of 2000 actions 1298
(2) Amendment of Foreign Assets Control Regulations: North Korea 1299
(3) Amendment of Export Administration Regulations: Wassenaar Arrangement 1300
Cross References 1301
Table of Cases 1303
Index 1319

Preface

I welcome this latest edition of the *Digest of United States Practice in International Law,* for the year 2006. With the publication of this edition, the *Digest* returns to its regular schedule; henceforth, each edition will be published during the calendar year following the year to which it is devoted. Together with the edition for 2006, we are simultaneously releasing a *Cumulative Index* covering every edition of the *Digest* published for the years 1989 through 2006. It is our hope that scholars and practitioners alike will find both this latest edition of the *Digest* and the *Cumulative Index* to be useful.

The Institute is very pleased to work with both the Office of the Legal Adviser and with our co-publisher, the Oxford University Press, in making these volumes available for the use of the international legal community.

Don Wallace, Jr.
Chairman
International Law Institute

00-Cummins-Prelims.indd xxiii 10/22/07 11:22:11 PM

00-Cummins-Prelims.indd xxiv 10/22/07 11:22:11 PM

Introduction

I am pleased to introduce the *Digest of United States Practice in International Law* for 2006. This year marked the fifth anniversary of September 11, 2001, and the events of that date and its aftermath have had a lasting effect on the development of international law in the United States and globally.

During 2006 my colleagues and I continued to engage our international partners in intensive discussions about the appropriate legal framework for the detention and treatment of international terrorists. The U.S. legal framework on these issues continued to evolve significantly through the U.S. Supreme Court's decision in the *Hamdan* case in June and the enactment of the Military Commissions Act in October. Armed conflicts during the year including those involving Israel, Lebanon, the Palestinian Authority, and Iraq raised other issues related to the law of war.

The United States welcomed the International Committee of the Red Cross' study on the customary international law of the law of war and provided what we believe are constructive initial comments on certain aspects of methodology that raise questions about the study's conclusions.

But these issues were, of course, only one facet of the office's practice during the year. The United States dispatched to Geneva two separate large, senior-level interagency delegations to present and discuss with the UN Committee Against Torture and the Human Rights Committee U.S. implementation of its obligations under the Convention Against Torture and the International Covenant on Civil and Political Rights. These presentations received wide domestic and international media attention and provided a forum for the

00-Cummins-Prelims.indd xxv 10/22/07 11:22:11 PM

United States to explain the scope of its obligations under these important treaties. In 2006 we also continued to press for action to stop the genocide in Darfur and remained actively engaged in attempts to broker peaceful resolution of conflicts in Sudan, Ethiopia-Eritrea, and the Middle East. Our efforts to curb potential nuclear and missile proliferation in North Korea and Iran, including by working to facilitate adoption and robust implementation of targeted measures imposed by the UN Security Council and through the Six-Party process on denuclearization of the Korean peninsula, were only the highest visibility examples in the area of nonproliferation and arms control.

In 2006 the office also focused significant attention on cooperation in international criminal law enforcement and data sharing, commercial and family law, trade and investment, transboundary environmental issues, and maritime labor law. The United States continued its support for international and hybrid criminal tribunals and its efforts to minimize divisiveness over the International Criminal Court, and both brought and defended against actions in trade and investment arbitrations under WTO and NAFTA dispute resolution mechanisms.

The office continued to play a leading role in the development of U.S. treaty law and practice. For example, it advised on the conclusion of over 200 international agreements by the United States during the year and worked with the Senate to obtain advice and consent to 14 treaties, including the U.S.-United Kingdom Extradition Treaty, the COE Convention on Cybercrime, the UN Convention Against Transnational Organized Crime and Two Protocols, and the UN Convention Against Corruption. We also obtained Senate approval of several agreements important to U.S. economic interests, such as the U.S.-Uruguay investment treaty and several bilateral tax treaties. The office also set forth U.S. positions on issues such as the appropriate interpretation of treaties and responses to reservations to certain treaties.

In U.S. courts, the year saw further developments related to the applicability of the Alien Tort Statute, U.S. consular notification obligations under the Vienna Convention on Consular Relations, and the scope of the Foreign Sovereign Immunities Act, including several Supreme Court decisions on consular notification and immunities.

00-Cummins-Prelims.indd xxvi 10/22/07 11:22:12 PM

The *Digest* reflects the continuing commitment of the Office of the Legal Adviser to provide current information and documentation on a timely basis reflecting U.S. views in various arenas of international law. It remains, in the truest sense, a collaborative undertaking involving the sustained effort of the attorneys and paralegals who work in the Office of the Legal Adviser. For 2006 I want especially to thank Patricia McDonough for drafting the terrorism sanctions section of Chapter 3, Alexandra Perina for the individual claims section of Chapter 8, David Huitema for Chapters 9 and 14, and Anna Conley, a former student intern, for the international civil litigation section of Chapter 15. Once again, a very special note of thanks goes to the Department's Senior Reference Librarian, Legal, Joan Sherer, whose technical assistance is invaluable. Finally, I thank the editor of the *Digest* Sally Cummins without whom the volume would not exist.

We continue to value our rewarding collaboration with the International Law Institute. The Institute's Director Professor Don Wallace and editor William Mays again have our sincere thanks for their superb support and guidance. We welcome Oxford University Press as co-publisher of the *Digest* by agreement with the International Law Institute. We look forward to a long and fruitful relationship with both of these publishers.

Comments and suggestions from readers are always welcome.

John B. Bellinger, III
The Legal Adviser
Department of State

00-Cummins-Prelims.indd xxviii 10/22/07 11:22:12 PM

Note from the Editor

With the *Digest of United States Practice in International Law* for calendar year 2006, the new *Digest* series inaugurated in 2000 is complete for the period 1989-2006. Following some delays as we filled in the 1989-1999 period when publication was suspended, this volume's release in December 2007 moves us back to our anticipated schedule of producing the annual volume within the following calendar year.

I want to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. Government who made this cooperative venture possible. The assistance of Anna Conley, a former student intern with the Office who drafted the International Civil Litigation section of Chapter 15, and of Patricia McDonough (terrorism sanctions), Alexandra Perina (individual claims in Chapter 8) and David Huitema (Chapters 9 and 14) was key to its successful completion. As always, I thank our colleagues at the International Law Institute, Director Don Wallace, Jr., and editor William Mays, for their valuable support and guidance. We are delighted to be working now also with Oxford University Press under its co-publishing agreement with the Institute.

The 2006 volume continues the organization and general approach adopted with *Digest 2000*. In order to provide broad coverage of significant developments as soon as possible after the end of the covered year, we rely in most cases on the text of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Our general practice is to limit entries in each annual *Digest* to material from the relevant year, leaving it to the reader to check for updates. One exception to this practice is the inclusion of footnotes referencing

00-Cummins-Prelims.indd xxix 10/22/07 11:22:12 PM

relevant U.S. Supreme Court decisions released in the following year before the book has gone to print; discussion of such decisions is deferred to the subsequent volume.

As in previous volumes, our goal is to assure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily available elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*.

Other documents are available from multiple public sources, both in hard copy and from various online services. The decision by the United Nations to make its Official Document System available to the public without charge provides a welcome source for UN-related documents of all types, available at *http://documents.un.org/*. The UN's home page at *www.un.org* also remains a valuable source for many UN documents.

The U.S. Government Printing Office provides access to a number of publications, including the Federal Register, Congressional Record, U.S. Code, Code of Federal Regulations, and Weekly Compilation of Presidential Documents, as well as congressional documents and reports and statutes, at *www.access.gpo.gov*. Two particularly useful links for treaty issues are: Senate Treaty Documents, for the President's transmittal of treaties to the Senate for advice and consent, with related materials, available at *www.gpoaccess.gov/serialset/cdocuments/index.html,* and Senate Executive Reports, providing among other things the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent, available at *www.gpoaccess.gov/serialset/creports/index.html*. In addition, the Library of Congress provides extensive legislative information at *http://thomas.loc.gov*.

The U.S. government's official web portal is *www.firstgov.gov*, with links to a wide range of government agencies and other sites; the State Department's home page is *www.state.gov*.

While court opinions are most readily available through commercial online services and bound volumes, some materials are available through links to individual federal court web sites provided at

www.uscourts.gov/links.html. The official Supreme Court web site is maintained at *www.supremecourtus.gov*. The Office of the Solicitor General makes its briefs filed in the Supreme Court available at *www.usdoj.gov/osg*.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to scholars and other academics, government lawyers, and private practitioners.

As always, suggestions from readers and users are welcomed.

Sally J. Cummins

00-Cummins-Prelims.indd xxxii 10/22/07 11:22:12 PM

Chapter 1

Nationality, Citizenship and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Statelessness

> In 2006 the Department of State responded to an inquiry concerning the fact that the United States has not become a party to either the 1954 Convention Relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness. Information on the U.S. position is set forth below.

As a general principle, the United States does not intend to become a party to either the 1954 Convention Relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness. United States law is generally consistent with the objectives of the two conventions; that is, the United States does not contribute to the problem of statelessness, nor does U.S. law treat stateless individuals differently from other aliens. As these are the two main issues that these conventions address, there is no compelling reason for the United States to become a party to either convention.

Moreover, there are specific obligations in these conventions that are inconsistent with U.S. law. For example, Article 7 of the 1961 Convention prohibits the renunciation of nationality where

01-Cummins-Chap01.indd 1 10/22/07 11:24:39 PM

such renunciation would result in statelessness. This conflicts with U.S. law which has long recognized the right of expatriation as a natural and inherent right of all people. As such, under U.S. law, a citizen with the requisite intent can voluntarily renounce his citizenship without having already acquired the nationality of another state.

In addition, provisions such as Article 3 of the 1961 Convention that direct how a State grants its citizenship, e.g. by providing that all persons born in an airplane registered in the State or on a boat flying the State's flag to have been born in the state's territory, conflict with existing U.S. nationality law. Similarly, Article 23 of the 1954 Convention provides that stateless persons have the same access to public relief and assistance as nationals. Although U.S. law as a general matter treats stateless persons the same as other aliens, aliens are not necessarily treated the same as U.S. nationals in the context of federal, state and local public assistance. Article 31 of the 1954 convention also limits the ability of states to expel stateless persons. This is inconsistent with U.S. immigration law which provides for the deportation of stateless aliens on the same grounds as those who are not stateless. While these examples are not exhaustive, they demonstrate some of the issues and inconsistencies with U.S. law that the United States has identified in the conventions.

2. Determination of Citizenship in *In Vitro* Case

In a letter of October 10, 2006, Edward A. Betancourt, Director, Office of Policy Review and Interagency Liaison, Bureau of Consular Affairs, Department of State, responded to an inquiry from the Department of Homeland Security, U.S. Citizenship and Immigration Services, concerning determination of citizenship of a child born in Canada in an *in vitro* case involving a U.S. citizen sperm donor and an anonymous egg donor. Excerpts below from the letter explain Mr. Betancourt's conclusion that the Department of State "is of the view that the child in question does indeed have a claim to U.S. citizenship

pursuant to Section 309(a) of the Immigration and Nationality Act."

---

* * * *

. . . We believe that the crucial point to keep in mind is the fact that citizenship is a federal matter, and governing federal law establishes that blood relationships are critical. Section 309(a)(1) emphasizes the need to demonstrate the existence of such a relationship between an out-of-wedlock child and the alleged U.S. citizen father. It appears . . . that such a relationship is not at all in dispute in this case. In assigning parentage [to the birth mother's husband] by way of operation of law, neither [state] nor [foreign law] can alter what is indeed a medical reality: that [the U.S. citizen sperm donor] is the biological father of the child.

In addition to blood relationship, section 309(a) requires, as you know, the establishment of a legal relationship between father and child. Legal relationship is typically established by one of three means: a court order of paternity, an affidavit of paternity, or legitimation. In this case, [the U.S. citizen sperm donor] is recognized on the birth certificate as the child's legal father, and he can readily establish the requisite legal nexus by executing under oath a written acknowledgment of paternity. A legal relationship can be forged without the need to legitimate the child in accordance with the law of the child's residence or domicile. In fact, [state law] is not applicable to the fact situation with which we are dealing since the matter at hand involves in vitro fertilization and an anonymous egg donor, not artificial insemination of the biological mother.

If in addition to establishing the necessary biological and legal relationships with his child, . . . [the U.S. citizen sperm donor] provides the written financial undertaking and the evidence showing that he has the requisite Section 301(g) prior physical presence in the United States, we would recommend that the child be documented as a U.S. citizen. Such an outcome is not only prescribed under governing federal law but is undoubtedly consistent with the intention of the parties concerned.

* * * *

B. PASSPORTS

1. Western Hemisphere Travel Initiative

On August 11, 2006, the Departments of State and Homeland Security ("DHS") published a notice of proposed rulemaking by DHS, with request for public comment, for the air and sea phase of the Western Hemisphere Travel Initiative. 71 Fed. Reg. 46,155 (Aug. 11, 2006). The Western Hemisphere Travel Initiative ("WHTI") was first announced by the two departments in April 2005 and an advance notice of proposed rulemaking was published on September 1, 2005. 70 Fed. Reg. 52,037 (Sept. 1, 2005). *See Digest 2005* at 1-5.

The Intelligence Reform and Terrorism Prevention Act of 2004 mandated that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require U.S. citizens and foreign nationals for whom the passport requirement had previously been waived to present a passport or other document deemed sufficient to establish identity and nationality when entering the United States. Thus the WHTI would require U.S. citizens, Canadian citizens, citizens of the British Overseas Territory of Bermuda, and Mexican citizens, to have a passport or other designated secure document to enter or re-enter the United States. The Department of State and DHS proposed to implement the WHTI in two phases.

A media note released by the Department of State on August 11, 2006, described the main features of the proposed rulemaking for the initial stage as excerpted below. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/70299.htm*. As discussed following these excerpts, some changes were made in the final rule.

---

* * * *

The proposed timeline and requirements would be as follows:

January 8, 2007 – Passports, Merchant Mariner Documents (MMD) or NEXUS Air cards would be required for all air

travel, and most commercial sea travel, from within the Western Hemisphere for citizens of the United States, Canada, Mexico, and Bermuda. This is a change from the previously scheduled date of January 1, in order to accommodate holiday travel.

January 1, 2008 – The statutory deadline for all Western Hemisphere travel, including land border travel. Passports or other accepted documents determined to sufficiently denote identity and citizenship will be required for anyone crossing at a land border, as well as air and sea.

* * * *

The passport (U.S. or foreign) will be the document of choice for entering or re-entering the United States through airports and seaports. In addition, the proposal published today lists a limited number of other documents that will be acceptable: the NEXUS air card for those enrolled in this international trusted traveler program; U.S. military ID for active-duty military members; and the Merchant Mariner Document ("z" card) for merchant mariners.

The proposed plan for the land-border implementation phase will be published separately in the Federal Register at a later date. In addition, a separate Proposed Rule will be published regarding the use of a U.S. passport card at land borders.

* * * *

The Federal Register provided background information and described certain exceptions to the new requirements in the proposed rule, as excerpted below (some footnotes omitted).

---

* * * *

A. Current Entry Requirements for United States Citizens Arriving by Air or Sea

In general, under federal law it is "unlawful for any citizen of the United States to depart from or enter * * * the United States unless

he bears a valid United States passport."[1] However, the statutory passport requirement has not been applied to United States citizens when departing from or entering into the United States from within the Western Hemisphere other than from Cuba.[2] Currently, a United States citizen entering the United States from within the Western Hemisphere, other than from Cuba, is inspected at an air or sea port-of-entry by a DHS Bureau of Customs and Border Protection (CBP) officer. To lawfully enter the United States, a person need only satisfy the CBP officer of his or her United States citizenship.[4] In addition to assessing the verbal declaration and examining the documentation the person submits, the CBP officer may ask for additional identification and evidence of citizenship until the officer is satisfied that the person is a United States citizen.

As a result of this procedure, United States citizens arriving at air or sea ports-of-entry from within the Western Hemisphere currently produce a variety of documents to establish their citizenship and right to enter the United States. A driver's license issued by a state motor vehicle administration or other competent state government authority is a common form of identity document now accepted by CBP at the border even though such documents do not denote citizenship. Citizenship documents currently accepted at ports-of-entry generally include birth certificates issued by a United States jurisdiction, Consular Reports of Birth Abroad, Certificates of Naturalization, and Certificates of Citizenship.

B. Current Entry Requirements for Nonimmigrant Aliens Arriving by Air or Sea

Currently, each nonimmigrant alien arriving in the United States must present to the CBP officer at the port-of-entry a valid unexpired passport issued by his or her country of citizenship and, if

---

[1] Section 215(b) of the Immigration and Nationality Act (INA), 8 U.S.C. 1185(b).

[2] *See* 22 CFR 53.2(b), which waived the passport requirement pursuant to section 215(b) of the INA, 8 U.S.C. 1185(b).

* * * *

[4] 8 CFR 235.1(b).

required, a valid unexpired visa issued by a United States embassy or consulate abroad.[5] Nonimmigrant aliens entering the United States must also satisfy any other applicable entry requirements (e.g., United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT)). For nonimmigrant aliens arriving in the United States, the only current general exceptions to the passport requirement apply to the admission of (1) citizens of Canada and Bermuda arriving from anywhere in the Western Hemisphere and (2) Mexican nationals with a Border Crossing Card (BCC) arriving from contiguous territory.

* * * *

C. Intelligence Reform and Terrorism Prevention Act of 2004

* * * *

United States citizens and nonimmigrant aliens, who currently are not required to have passports pursuant to sections 215(b) and 212(d)(4)(B) of the INA respectively, would be required to present a passport or other identity and citizenship document deemed sufficient by the Secretary of Homeland Security when entering the United States from countries within the Western Hemisphere. The principal groups affected by this provision of IRTPA are United States citizens, Canadian citizens, citizens of Bermuda, and Mexican citizens holding BCC cards. These groups of individuals are currently exempt from the general passport requirement when entering the United States from within the Western Hemisphere.

* * * *

[Proposed 22 CFR] § 53.2 Exceptions.

A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States:

* * * *

(e) When traveling as a member of the Armed Forces of the United States on active duty; or

---

[5] Section 212(a)(7)(B)(i) of the INA, 8 U.S.C. 1182(a)(7)(B)(i).

(f) When traveling as a U.S. citizen seaman, carrying a Merchant Marine Document (MMD or Z-card) in conjunction with maritime business. The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under 22 CFR Part 51; or
(g) When traveling as a participant in the NEXUS Air program with a valid NEXUS Air membership card. United States citizens who are traveling as participants in the NEXUS Air program, may present, in lieu of a passport, a valid NEXUS Air membership card when using a NEXUS Air kiosk prior to entering the United States. The NEXUS Air card is not sufficient to establish citizenship for purposes of issuance of a U.S. passport under 22 CFR Part 51; or
(h) When the U.S. citizen bears another document, or combination of documents, that the Secretary of Homeland Security has determined under Section 7209(b) of Public Law 108-458 (8 U.S.C. 1185 note) to be sufficient to denote identity and citizenship; or
(i) When the U.S. citizen is employed directly or indirectly on the construction, operation, or maintenance of works undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission (IBWC), TS 994, 9 Bevans 1166, 59 Stat. 1219, or other related agreements provided that the U.S. citizen bears an official identification card issued by the IBWC; or
(j) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen because there is an unforeseen emergency; or
(k) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen for humanitarian or national interest reasons.

* * * *

On November 24, 2006, the Departments of Homeland Security and State published a final rule covering the passport

requirement for arrivals at air ports-of-entry only and modifying the effective date to January 23, 2007. 71 Fed. Reg. 68,412 (Nov. 24, 2006). As explained in the Federal Register Summary:

> . . . [W]ith limited exceptions discussed below, beginning January 23, 2007, all United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States from within the Western Hemisphere at air ports-of-entry will be required to present a valid passport. This final rule differs from the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on August 11, 2006, by finalizing new documentation requirements only for travelers arriving in the United States by air. The portion of the NPRM that proposed changes in documentation requirements for travelers arriving by sea will not be finalized under this rule. Requirements for United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States at land and sea ports-of-entry will be addressed in a separate, future rulemaking.

Excerpts follow from the Statutory and Regulatory History and Conclusion sections of the Federal Register publication (footnotes omitted). *See also* Department of State media note, November 22, 2006, available at *www.state.gov/r/pa/prs/ps/2006/76752.htm*.

---

* * * *

B. Statutory and Regulatory History

* * * *

On October 4, 2006, the President signed into law the Department of Homeland Security Appropriations Act of 2007 (DHS Appropriations Act of 2007). [Pub. L. No. 109-295, 120 Stat. 1355] Section 546 of the DHS Appropriations Act of 2007 amended section 7209 of IRTPA by stressing the need for DHS and DOS to expeditiously implement the requirements by the earlier of

two dates, June 1, 2009, or three months after the Secretaries of Homeland Security and State certify that certain criteria have been met. The section requires "expeditious[]" action and states that requirements must be satisfied by the "earlier" of dates identified. By using this language, the drafters expressed an intention for rapid action. Congress also expressed an interest in having the requirements for land and sea implemented at the same time as part of the DHS Appropriations Act of 2007.

On October 17, 2006, to meet the documentary requirements of the Western Hemisphere Travel Initiative and to facilitate the frequent travel of persons living in border communities, the Department of State, in consultation with the Department of Homeland Security, proposed to develop a card-format passport, called the Passport Card, for international travel by United States citizens through land and sea ports of entry between the United States, Canada, Mexico, or the Caribbean and Bermuda.

II. Summary of Changes From NPRM and New Document Requirements

Under this final rule, beginning January 23, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air ports-of-entry will generally be required to present a valid passport. . . . The only exceptions to this requirement would be for United States citizens who are members of the United States Armed Forces traveling on active duty; travelers who present a Merchant Mariner Document traveling in conjunction with maritime business; and travelers who present a NEXUS Air card used at a NEXUS Air kiosk.

* * * *

The new passport requirement does not apply to travelers arriving at land or sea ports-of-entry. Additionally, U.S. citizens and nationals who travel directly between parts of the United States,[24] which includes Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, Swains Island, and the Commonwealth of the

[24] As defined in section 215(c) of the INA (8 U.S.C. 1185(c)), the term "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

Northern Mariana Islands, without touching at a foreign port or place, are not required to present a valid passport.

2. Passport Card

As noted in the November 2006 final rule discussed *supra*, on October 17, 2006, the Department of State, in consultation with the Department of Homeland Security, published a proposed rule to develop a card-format passport, with request for public comment. 71 Fed. Reg. 60,928 (Oct. 17, 2006). The card would be for international travel by U.S. citizens for use only through land and sea ports of entry between the United States, Canada, Mexico, the Caribbean, and Bermuda. A Department of State media note of the same date explained:

> To facilitate the frequent travel of those living in U.S. border communities and those traveling on commercial maritime vessels, the Department of State has committed to producing a passport card that incorporates cutting-edge technology. The technology incorporated in the proposed card was designed in coordination with DHS specifically to address the operational needs of land border-crossings. The proposed passport card would use long-range, or vicinity, radio frequency identification (RFID) technology to link the card to a secure U.S. government database containing biographical data and a photograph. The card itself will not contain any personal information, and DHS will implement protections to keep the database secure.

The media note is available at *www.state.gov/r/pa/prs/ps/2006/74083.htm*. Excerpts follow from the Supplementary Information section of the Federal Register publication (footnotes omitted).

---

* * * *

. . . Passport Services has seen an increase in passport demand from a base level of seven million passports in 2003 to an expected total of 12-12.5 million in fiscal year 2006. Demand for passports is forecast to continue to increase to 16 million or more in FY-2007 and thereafter. However, the Department of State recognizes that there are circumstances where, due to reasons of both cost and ease of use, the traditional book-style U.S. passport may not be the optimal solution for international travelers along the northern and southern land borders of the U.S., or international sea travel between the U.S., Canada, Mexico, the Caribbean, and Bermuda. Therefore, the Department of State, in consultation with the DHS, is proposing an alternative format passport specifically designed for international land and sea travel between the U.S., Canada, Mexico, the Caribbean, and Bermuda.

The Card Format Passport

The term "passport" means any travel document issued by the competent authority of a sovereign nation showing the bearer's identity and nationality that is deemed valid for the entry of the bearer into a foreign country. 22 U.S.C. 211(a) provides that the Secretary of State has the authority to issue passports for the U.S.

. . . Under this proposed rule, passport cards, like passport books, would be issued for a ten-year validity period for U.S. citizens sixteen years old and older, and for a five-year validity period for U.S. citizens less than 16 years of age. The Department of State proposes to utilize the same application procedures and adjudication standards for the passport book and card and to permit U.S. citizens to hold both a passport book and card simultaneously. In addition, if a passport applicant holds a valid passport book, the applicant may apply for a passport card as a "renewal" and pay the lower renewal fee rate.

. . . There is precedence for limited use passports. For example, [t]he Department of State issues passports only for one time use to allow the traveler to return to the U.S.

The passport card is designed specifically to address the needs and travel patterns of those who live in land border communities and frequently cross the border in their day-to-day activities. The technical architecture of the passport card is designed to

address the operational needs of pedestrian and vehicular traffic in the land border environment, and international sea travel as discussed herein, but not the operational needs of inspection at airports. Moreover, the passport card is intended not only to enhance security efforts for international land and sea travel between the U.S., Canada, Mexico, the Caribbean, and Bermuda, but is also intended to assist DHS in expediting the movement of legitimate travel within the Western Hemisphere.

In particular, the land border presents complex operational challenges, in that a tremendous amount of traffic must be processed in a short amount of time. There are often several passengers in a vehicle, and multiple vehicles arriving at one time at each land border port-of-entry. Many of the people encountered crossing at the land border ports of entry are frequent crossers. However, CBP does not receive advance information on these land border travelers. For these reasons, the Department of State, in consultation with DHS, agreed to develop a technology-based solution.

The passport card is designed and authorized for international land and sea travel between the U.S., Canada, Mexico, the Caribbean, and Bermuda and will not be a globally interoperable document. Therefore, the ICAO standards and recommendations for globally interoperable passports would not apply to passport cards. The passport card will be a highly secure document with many features consistent with ICAO 9303 Part 3 definitions of TD-1 specifications. It will use a full facial image printed on the card as the biometric identifier in conformity with ICAO standards for ePassport images and utilize the international standard for Machine Readable Zone (MRZ) encryption.

* * * *

3. Electronic Passport

On August 14, 2006, a Department of State media note announced that "[t]o enhance border security and to facilitate travel, the Department of State began issuing Electronic Passports (e-passports) to the public today." The full text of the media note, excerpted further below, is available at

www.state.gov/r/pa/prs/ps/2006/70433.htm. See also Digest 2005 at 6-8.

Consistent with globally interoperable specifications adopted by the International Civil Aviation Organization (ICAO), this next generation of the U.S. passport includes biometric technology. A contactless chip in the rear cover of the passport will contain the same data as that found on the biographic data page of the passport (name, date of birth, gender, place of birth, dates of passport issuance and expiration, passport number), and will also include a digital image of the bearer's photograph.

The Department of State has employed a multi-layered approach to protect the privacy of the information and to mitigate the chances of the electronic data being skimmed (unauthorized reading) or eavesdropped (intercepting communication of the transmission of data between the chip and the reader by unintended recipients). Metallic anti-skimming material incorporated into the front cover and spine of the e-passport book prevents the chip from being skimmed, or read, when the book is fully closed; Basic Access Control (BAC) technology, which requires that the data page be read electronically to generate a key that unlocks the chip, will prevent skimming and eavesdropping; and a randomized unique identification (RUID) feature will mitigate the risk that an e-passport holder could be tracked. To prevent alteration or modification of the data on the chip, and to allow authorities to validate and authenticate the data, the information on the chip will include an electronic signature (PKI).

On October 28, 2006, the Department of Homeland Security announced that 24 of the 27 countries in the Visa Waiver Program ("VWP") met the October 28 deadline in keeping with INA § 217(a)(3) and 217(c)(2)(B), 8 U.S.C. § 1187, to begin issuing electronic passports ("e-Passports") to their citizens. Excerpts follow from a Department of State media note of that date. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/75184.htm.*

---

* * * *

VWP travelers who have valid machine-readable passports with a digital photograph issued before October 26, 2006 do not need an e-Passport until their current passport expires. Travelers can determine whether their passports meet the requirements for VWP travel by checking the Department of State's VWP information page on the consular website, http:// travel.state.gov, or by contacting their respective government.

Equipped with a contactless chip that stores the passport holder's biographic information and digital photograph, an e-Passport securely identifies the bearer, defends against identity theft, protects privacy, and impedes individuals attempting to travel using fraudulent documents. These passports can be identified by the international e-Passport symbol on their cover. The United States began issuing e-Passports to American citizens in August 2006.

The United States continues to work with the three countries not yet issuing e-Passports—Andorra, Brunei, and Liechtenstein—to ensure that they meet the requirement as soon as possible. Travelers from these countries will need to obtain a visa to enter the United States if they hold a passport issued on or after October 26, 2006, until e-Passports are available.

* * * *

4. Limitations on Passports

a. Child support arrearages

Effective October 1, 2006, the Department of State amended an existing regulation, promulgated under 42 U.S.C. § 652, to lower the amount of child support arrearages that can trigger denial of a passport. 71 Fed. Reg. 58,496 (Oct. 4, 2006). *See also Digest 2002* at 13-15. As explained in the summary section of the final rule:

> This final rule amends part 51 at Title 22 of the Code of Federal Regulations to change a ground of denying, revoking or cancelling a passport. The final rule amends the existing regulation at section 51.70(a) in Title 22 of the Code of Federal Regulations which requires the Secretary

of State to deny a passport to a person who has been certified by the Secretary of Health and Human Services to be in arrears of child support by an amount exceeding $5000 by changing it to $2500 in accordance with Section 7303 of Public Law 109-171, the Deficit Reduction Act of 2005.

b. Alleged collaboration with U.S.-designated terrorist group in foreign country

In September 2006 a U.S. citizen was arrested in Sri Lanka for alleged involvement with the LTTE, a U.S.-designated terrorist group. The U.S. citizen was released on bail, and requested that the embassy issue a new passport, the current passport being held by Sri Lankan authorities. The Department of State provided guidance to the post as follows.

---

* * * *

Current regulations provide for denial of passport services to individuals when the Department has been informed by competent authorities that an individual is, among other things, the subject of an outstanding U.S. federal arrest warrant or subject to a criminal court order prohibiting departure from the U.S. (22 CFR 51.70(b)(4). There is no provision for denial of passport services on the basis of foreign criminal charges. 7 FAM 1371 addresses the issue of surrender of U.S. passports to the host government and passport issuance when the host government does and does not request notification of issuance. Post has not requested return of the subject's passport because it was instructed not to do so by [the U.S. citizen in question].

In the absence of a legal basis for passport denial, the Department and posts abroad have no authority to do so. . . . 7 FAM 1387.27/1387.3 provide that a U.S. passport may not be denied to a U.S. national based on a foreign criminal court order, warrant, or condition of probation or parole. Thus, lacking legal

grounds for denial of passport services, and assuming [the American citizen in question] wishes to travel immediately, post may . . . issue [the American citizen] a usual and customary one-year, limited-validity passport . . . Prior to issuance, post should inform [the American citizen] that it is aware of the current disposition of [the American citizen's] passport and, per 7 FAM 462(f), ask that [the American citizen] provide a new statement accurately portraying the disposition of said passport. . . .

* * * *

. . . [I]t is the view of the Department that post should immediately inform the appropriate [Sri Lankan] authorities upon issuance of the passport, and should inform [the American citizen] that it intends to do so.

* * * *

5. Lost and Stolen Passports

In 2006 the United States entered into a memorandum of understanding with New Zealand to provide for sharing information on lost and stolen passports. *See Digest 2005* at 5-6 for discussion of a similar MOU entered into in 2005 with Australia. The MOUs, which are considered to be legally non-binding, record the intent of the parties to make available to each other information from their lost and stolen passport databases. These instruments are part of a broader initiative to establish a Multilateral Framework for Regional Movement Alert (RMAL) System in APEC. The Multilateral Framework for RMAL was adopted by the APEC Business Mobility Group meeting in Hoi An, Vietnam in September 2006. The full text of the report, with attached Multilateral Framework for Regional Movement Alert System (RMAL System), including the model MOU as Annex II, and related documents are available at *www.apec.org/apec/documents_reports/informal_experts_group_business_mobility/2006.html.*

C. IMMIGRATION AND VISAS

1. Bases for Ineligibility

a. Material support to terrorist organization: Required decision

In September 2006 the United States denied a visa application by Dr. Tariq Ramadan under § 212(a)(3)(B)(i)(I) of the Immigration and Nationality Act ("INA") for engaging in terrorist activity. Section 212(a)(3)(B)(iv) defines "engage in terrorist activity" to mean, among other things, "to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training . . . to a terrorist organization." § 212(a)(3)(B)(iv)(VI). The denial followed a June 23, 2006, court order that the United States make a decision on Mr. Ramadan's pending application.

In a daily Department of State press briefing on September 26, 2006, spokesman Sean McCormack explained:

> . . . [Dr. Ramadan] was denied a visa under Section 212(a)(3)(B) of the Immigration and Nationality Act for providing material support to a terrorist organization. . . . Dr. Ramadan was originally issued an H-1B work visa to teach in the U.S. in 2004. The State Department revoked this visa in July 2004 to allow the U.S. Government to follow up on information that came to light after that H-1B visa was issued. He subsequently applied for a B1-B2 visa, business and tourism visa in the fall of 2005. New information . . . which led to the revocation of the H-1B visa was evaluated in light of the fall 2005 visa application and that ultimately lead to a finding of inadmissibility.

The full text of the press briefing is available at *www.state.gov/r/pa/prs/dpb/2006/73167.htm*.

Excerpts below from the June 2006 decision by the U.S. District Court for the Southern District of New York ordering the U.S. government to decide Ramadan's visa application provide the court's analysis including, among other things, the applicability of the doctrine of consular nonreviewability in the circumstances of the case (most footnotes and citations to submissions in the case omitted). *American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006). The United States did not appeal the decision in the case. U.S. submissions to the district court, filed March 31 and April 24, 2006, are available at *www.state.gov/s/l/c8183.htm*.

* * * *

On January 25, 2006, Plaintiffs American Academy of Religion ("AAR"), American Association of University Professors ("AAUP"), PEN American Center ("PEN"), and Tariq Ramadan[4] (collectively, "Plaintiffs") filed this lawsuit against Michael Chertoff and Condoleezza Rice, in their official capacities as Secretary of the Department of Homeland Security ("DHS") and Department of State, respectively, challenging the continued exclusion of Professor Tariq Ramadan ("Ramadan") from the United States. Plaintiffs' lawsuit has two parts: (1) a First Amendment challenge to the Government's continued exclusion of Ramadan on the basis of his political views; and (2) a broader constitutional attack on Section 411(a)(1)(A)(iii) of the Patriot Act, 8 U.S.C. § 1182(a)(3)(B)(i)(VII), which permits DHS to exclude from the United States any alien that has used a "position of prominence within any country to endorse or espouse terrorist activity."

Plaintiffs now move pursuant to Rule 65(a) of the Federal Rules of Civil Procedure for a preliminary injunction so that Ramadan

[4] The Complaint asserts the rights of the organizational plaintiffs, not those of Tariq Ramadan. Ramadan is named as a plaintiff only "because he is symbolic of the problem," *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), and not because Plaintiffs assert that Ramadan, a Swiss citizen residing outside of the United States, has any constitutional or statutory right to enter the United States.

may enter the United States to attend their annual conferences. Plaintiffs seek an injunction in four parts: (i) enjoining DHS from denying a visa to Ramadan on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(VII); (ii) enjoining DHS from denying a visa to Ramadan on the basis of speech that U.S. residents have a constitutional right to hear; (iii) requiring DHS to immediately adjudicate Ramadan's pending visa application; and (iv) requiring DHS to immediately restore Ramadan's eligibility to rely on the visa waiver program.

* * * *

Ramadan is a well-known scholar of the Muslim world. . . .

* * * *

Prior to August 2004, Ramadan visited the United States on numerous occasions to give lectures, attend conferences, and meet with other scholars. . . .

As a Swiss citizen, Ramadan did not need to apply for a temporary nonimmigrant visa to enter the United States to attend these lectures and conferences. In January 2004, however, Ramadan accepted a long-term tenured teaching position at University of Notre Dame, prompting the need for an H-1B visa. The University of Notre Dame submitted a visa petition on Ramadan's behalf, which was approved by the U.S. Citizenship and Immigration Services on May 5, 2004.

. . . On July 28, 2004, . . . the U.S. Embassy in Bern, Switzerland informed Ramadan by telephone that his visa had been revoked. . . .

. . . [O]n December 13, 2004, Ramadan resigned his teaching post at University of Notre Dame. . . .

* * * *

On September 16, 2005, at the urgings of various organizations within the United States, Ramadan applied for a B visa, a nonimmigrant visa that would permit Ramadan to enter the United States to participate in various conferences. He submitted the application to the U.S. Embassy in Bern, Switzerland (the "Embassy"), as required by U.S. immigration law, and appended to the application invitations to a number of upcoming conferences. Ramadan appeared at the Embassy for an interview on December 20, 2005,

at which representatives from the Department of State and DHS asked him questions about his political views and associations. After the interview, Ramadan asked the interviewers whether his visa would be granted and, if so, when. He was told by a consular officer at the Embassy that he could expect that a decision "would take at least two days but no more than two years." To date, the Government has not acted on Ramadan's visa.

This delay is not typical. According to the U.S. Department of State website, the typical wait time (in calendar days) at the Bern Embassy for a nonimmigrant-visa interview appointment is 9 days. The typical wait time for a nonimmigrant visa to be processed is 2 days. While the website warns that the 2-day wait time does not include "the time for additional special clearance or administrative process," it advises that "most special clearances are resolved within 30 days of application."

The Government's revocation of Ramadan's H-1B visa has been criticized by numerous organizations, including Plaintiffs AAR and AAUP. Other groups, including the American Arab Anti-Discrimination Committee, the Jewish Council on Urban Affairs, and the Notre Dame Jewish Law Students Society, issued statements in support of admitting Ramadan into the United States; and major newspapers throughout the United States have commented on Ramadan's visa saga. Despite this public criticism, the Government has neither granted Ramadan's visa application, nor provided any explanation as to why it revoked Ramadan's H-1B visa in July 2004 or why it is unable to render a decision on Ramadan's pending B-visa application.

In opposing the instant motion for a preliminary injunction, the Government argues that Ramadan "has never had a visa revoked, a visa application denied, or any other adverse action taken against him" pursuant to 8 U.S.C. § 1182(a)(3)(B)(i)(VII). In fact, the Government claims that Ramadan's visa application was never denied on any basis at all, because the July 2004 revocation was only a "prudential" revocation, which is not a denial, but rather is a means of cancelling a visa while the Government carries on additional investigation. Thereafter, the Government continued to investigate Ramadan's case from July through December 2004. This investigation was mooted, however, after Ramadan resigned

his post at the University of Notre Dame in December 2004, since an H-1B visa is premised upon employment in the United States, and Ramadan no longer had nor sought such employment. Thus, the Government contends that it never actually denied Ramadan a visa. As to the September 2005 application for a B visa, the Government contends that it has not denied Ramadan a visa, as the application is still under active consideration.

Other than these bland nostrums, the Government gives no hint of what or who prompted the "prudential" revocation, although we can infer from public information on the Department of State's website that DHS, rather than consular officials in Bern, provided the information that led to the revocation. Further, the Government gives no clue as to why it is suspicious of Ramadan, or what potential threats it is investigating or contemplating. The Government assures, however, that "based on the information available to the Government, the relevant officials have not determined, and do not at this time intend to determine, for purposes of the pending visa application, that Mr. Ramadan is ineligible under 8 U.S.C. § 1182(a)(3)(B)(i)(VII)."

The Government's position in this litigation directly contradicts DHS's August 2004 explanation for the revocation of Ramadan's H-1B visa, which was that Ramadan's visa was revoked "because of a section that applies to aliens who have used a 'position of prominence within any country to endorse or espouse terrorist activity.'" Mr. Knocke, the DHS spokesperson who made the August 2004 statement, is still an employee of DHS, and available to the Government, yet he has neither submitted an affidavit on the Government's behalf nor disavowed the statement attributed to him. Similarly, DHS has never renounced nor retracted it-except through this litigation.

Rather than explaining DHS's statement or reconciling it with the Government's position in this litigation, the Government attempts to render the statement inoperative by explaining:

> Plaintiffs allege that the July 2004 revocation of Mr. Ramadan's visa was based on 8 U.S.C. § 1182(a) (3)(B)(i)(VII). . . . That allegation is incorrect. Mr. Ramadan has never had a visa revoked, a visa application denied, or any other adverse

> action taken against him pursuant to that provision [citation omitted]. Accordingly, any statement to the contrary that *may have appeared* in the media or *may have been made* by any Government spokesperson was erroneous.

(Govt's Opp'n 7-8 (emphasis added)).

Procedural History

Plaintiffs are frustrated by Ramadan's inability to enter the United States, as it means that Plaintiffs are unable to interact with him in person and engage him in debate. Ramadan applied for a B visa in September 2005. He was interviewed in September and again in December 2005, yet he—and therefore Plaintiffs—are still waiting. Ramadan was told in December 2005 that further review of his case could be as short as two days (a projection we now know to be inaccurate), or as long as two years (a projection that becomes more accurate with each passing day). Dissatisfied with this state of affairs, Plaintiffs instituted this proceeding on January 26, 2006, and moved on March 16, 2006 for a preliminary injunction compelling the Government to permit Ramadan to enter the United States to attend their conferences, or, in the alternative, compelling the Government to render a final decision on Ramadan's pending visa application.

* * * *

2. The doctrine of consular nonreviewability

The Government contends that it need not provide an explanation for its actions, because the doctrine of consular nonreviewability bars this Court from reviewing the Government's decision to exclude Ramadan. But this argument directly contradicts [*Kleindienst v. Mandel*, 408 U.S. 753 (1972)] and its progeny, which require the Government to justify the exclusion of an alien when the First Amendment rights of American citizens are implicated. . . . This limited review is necessary to ensure compliance with the First Amendment, a duty that has been expressly delegated to the federal courts. . . .

The Government's argument also misapplies the doctrine of consular nonreviewability. Consular nonreviewability is a long-standing judicial practice of refusing to review a consular official's decision to issue or withhold a visa. *See Saavedra Bruno v. Albright*, 339 U.S. App. D.C. 78, 197 F.3d 1153, 1159 (D.C. Cir. 1999). It has been applied by courts to preclude lawsuits by aliens—or their U.S. citizen sponsors—challenging a consular official's denial of a visa. . . . But the doctrine does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims. In fact, in *Saavedra Bruno*, the D.C. Circuit expressly distinguished between cases like *Saavedra*, in which disappointed aliens seek review of their visa applications, and cases like this one, in which American citizens challenge the Government's action on constitutional grounds. . . . Consular nonreviewability applies in the former, but not the latter. . . . Because this case . . . involves "claims by United States citizens rather than aliens . . . and statutory claims that are accompanied by constitutional ones," the doctrine of consular nonreviewability is inapplicable. *Saavedra Bruno*, 197 F.3d at 1163. . . .

Furthermore, the Government does not explain why the doctrine ought to apply here at all, since its papers demonstrate that consular officials are not in charge of Ramadan's case and are merely awaiting a Security Advisory Opinion ("SAO") from other Government officials before they can adjudicate Ramadan's pending visa application. Once the required SAO is received, consular officials in Bern are prepared to make a final determination on Ramadan's case. Whichever federal agency is responsible for the delay in issuing an SAO in Ramadan's case, it is clear from Mr. Derrick's affidavit that consular officials are not the problem.

DHS is clearly involved in Ramadan's case. At a Department of State Press Briefing on August 24, 2004, a press officer was asked why Mr. Ramadan's H-1B visa was revoked. The press officer responded: "Mr. Ramadan's visa was revoked pursuant to an action by the Department of Homeland Security to invalidate the petition on which it was based . . ." See http://www.state.gov/r/pa/prs/dpb/2004/35740.htm. In response to a follow-up question, the Department of State spokesperson repeated: "[T]he reason [Ramadan's visa] was revoked was on the basis of a Department of

Homeland Security action to invalidate the petition on which it was based." Id. DHS's statement, which was published the following day in the Los Angeles Times, confirms that DHS was responsible for the July 2004 revocation. Finally, a DHS official attended the December 2005 visa interview. Considering this evidence in conjunction with Mr. Derrick's affidavit, it would appear that consular officials in Bern are awaiting instructions from DHS before proceeding on Ramadan's pending visa application.

The doctrine of consular nonreviewability applies to review of "a consular official's decision to issue or withhold a visa," not to the decisions of non-consular officials and certainly not to DHS. *See Abourezk*, 785 F.2d at 1051 n.6; *see also Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (finding the doctrine of consular nonreviewability did not apply where the alien plaintiffs challenged the authority of the Secretary of State, rather than the discretion of consular officials).

3. The Government's facially legitimate and bona fide reason

Since the Government has offered no explanation for its exclusion of Ramadan from the United States, the Court is unable to determine Plaintiffs' likelihood of success on the merits of their First Amendment claim. To prevail on their motion for preliminary injunction, Plaintiffs must make a clear showing that the Government has no facially legitimate and bona fide reason for continuing to exclude Ramadan from the United States. Such a showing is impossible since the Government has provided no explanation at all.

* * * *

The Government's opposition papers allude to "national security" concerns as a reason for its conduct. Without more, however, this is not adequate. There is no basis in the the record (e.g., no affidavits or documents) upon which the Court could find that national security concerns are facially legitimate or bona fide in Ramadan's case. "To find the conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a 'facially legitimate' reason would be to surrender to the Executive total discretion," even when the First

Amendment rights of American citizens are at stake. *Abourezk*, 592 F. Supp. at 888. This is a position long rejected by the Supreme Court:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). . . . Thus, while the Government may exclude Ramadan if he poses a legitimate threat to national security, it may not invoke "national security" as a protective shroud to justify the exclusion of aliens on the basis of their political beliefs. This should pose no dilemma for the Government. If Ramadan is a threat to national security, or there is some other facially legitimate and bona fide reason for his exclusion, the Government may exclude him. But the Government must provide an explanation. It has not done so.

* * * *

The Court recognizes the political nature of the pending question, and the Executive's broad power to exclude aliens. It also recognizes the well-established limitation on its authority in this area. Even though the Government has not articulated a reason for excluding Ramadan, the Court acknowledges that such reason may exist. If so, *Mandel* makes clear that this Court has no authority to override the Government's decision. *See Mandel*, 408 U.S. at 769-70. Rather than speculate at this juncture as to the reasons why the Government has acted as it has with regard to Ramadan's visa applications, or assume from the absence of an explanation that the Government lacks a facially legitimate and bona fide reason for its conduct, it is distinctly preferable for the Government to explain itself.

C. The Government's Failure to Adjudicate Ramadan's Visa Application

The Government takes the position that it is "impossible" to "predict the additional time required to complete processing of

Mr. Ramadan's pending visa application." The Government further indicates that cases like Ramadan's, which "may" involve INA § 212(a)(3)(B), "take significantly longer" than the average visa application. Ramadan was previously informed that this could be as long as two years. Id. As the Court previously observed, . . . the Government's delay appears attributable, at least in part, to the fact that the Government is waiting for "possible future statements" that would render Ramadan ineligible to enter the United States. Accepting this position, and allowing the Government to wait for "possible future discovery of statements" would mean that the Government could delay final adjudication indefinitely, evading constitutional review by its own failure to render a decision on Ramadan's application. The Court will not allow this. The Government cannot escape constitutional review by its own inaction, nor can it exclude an alien de facto, by refusing to adjudicate the alien's visa application, and thereby expand the scope of the Executive's power beyond statutorily and constitutionally permissible means. Under *Mandel* and its progeny, this Court retains a limited power of review, to ensure that the Executive exercises its power to exclude aliens within the boundaries permitted by Congressional mandate and the Constitution.

The Government contends that the Court has no legal or statutory authority to expedite the adjudication of Ramadan's visa or compel consular officials to render a final decision. The Government is incorrect. Section 6 of the Administrative Procedure Act ("APA") requires agencies, including the Department of State and DHS, to render decisions "within a reasonable period of time." 5 U.S.C. § 555(b). . . .

Where the agency in charge of the adjudication fails to render a decision within a reasonable period of time, as required by § 555(b), the Court has the power to grant a writ of mandamus compelling an adjudication. . . .

The Government challenges the use of mandamus in this case. Specifically, the Government argues that the "extraordinary" remedy of mandamus is inappropriate in this case because "visa issuance is completely discretionary," and mandamus is available only where the official's duty is nondiscretionary. In making this argument, the Government is "confusing its discretion over how it

resolves [the applications] . . . with its discretion over whether it resolves them." *Yue Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D.N.M. 1999) (quoting *Dabone v. Thornburgh*, 734 F. Supp. 195, 200 (E.D. Pa. 1990)). The Government is correct that its decision to grant or deny Ramadan a visa is sufficiently discretionary to lie beyond the scope of mandamus. But the wide latitude given the Executive to grant or deny a visa application—a discretion bounded only by the U.S. Constitution and Congressional mandate—does not include the authority to refuse to adjudicate a visa application. In fact, 22 C.F.R. § 41.106 expressly requires that consular officers process nonimmigrant visa applications "properly and *promptly*," while 22 C.F.R. § 41.121 mandates that consular officers "either issue or refuse" a completed visa. See 22 C.F.R. § 41.106 (emphasis added); 22 C.F.R. § 41.121(a); cf. 22 C.F.R. § 41.121(c) ("If the ground(s) of ineligibility may be overcome by the presentation of additional evidence . . . a review of the refusal may be deferred for not more than 120 days."). Read together, these regulations make clear that allowing a visa application to stagnate undecided for an indefinite period of time, as the Government appears to be doing in this case, is not a permissible option. Since the Government's obligation to adjudicate visa application is clearly prescribed, failure to issue or refuse a visa within a reasonable period of time triggers mandamus jurisdiction in federal court. . . .

* * * *

If the Government has a legitimate and bona fide reason for excluding Ramadan, then it may exclude him, but it must do so by acting on the pending visa application, not by studying Ramadan's application indefinitely, while hoping for more supportive evidence to appear in the future. Ramadan's voluminous books, articles and speeches provide more than an adequate basis for review. His frequent visits to the United States, including a visit to the State Department in October 2003, provide ample first-hand insight into Ramadan's views.

The record suggests that the Government has more than adequate information at hand to decide this matter. Moreover, the Government has a nondiscretionary obligation to render a decision on every visa application. *See* 22 C.F.R. §§ 41.106, 41.121.

The Government studied this matter from January 2004 through December 2004, and then from September 2005 to date. That is more than adequate time for adjudication of Ramadan's pending visa application. Out of an excess of caution, however, the Court will give the Government another ninety (90) days from the date of this Order to adjudicate Ramadan's pending application for a B visa. If the Government fails to issue a formal decision on Ramadan's pending application by this date, the Court will consider such other alternatives as are available and appropriate.

* * * *

b. Illegal reentry

On June 22, 2006, the U.S. Supreme Court affirmed a Tenth Circuit decision holding that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009-597), which provides for the reinstatement of a previous order of removal against an alien who departed this country, but then illegally reentered, applies to an alien who illegally reentered this country before the effective date (April 1, 1997) of that provision. *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006). The Court determined that this application of the statute was not impermissibly retroactive under U.S. law, reasoning that the Act applies to him "today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective." Excerpts from the Court's opinion follow (footnotes omitted).

For some time, the law has provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully enters again. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009-546, enlarged the class of illegal reentrants whose orders may be reinstated and limited the possible relief from a removal order available to them. *See* Immigration and Nationality

Act (INA), § 241(a)(5), 66 Stat. 204, as added by IIRIRA § 305(a)(3), 110 Stat. 3009-599, 8 U.S.C. § 1231(a)(5). The questions here are whether the new version of the reinstatement provision is correctly read to apply to individuals who reentered the United States before IIRIRA's effective date, and whether such a reading may be rejected as impermissibly retroactive. We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.

* * * *

The new law became effective on April 1, 1997, "the first day of the first month beginning more than 180 days after" IIRIRA's enactment. § 309(a), 110 Stat. 3009-625. Unlike its predecessor, § 241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order.

II

Humberto Fernandez-Vargas is a citizen of Mexico, who first came to the United States in the 1970s, only to be deported for immigration violations, and to reenter, several times, his last illegal return having been in 1982. Then his luck changed, and for over 20 years he remained undetected in Utah, where he started a trucking business and, in 1989, fathered a son, who is a United States citizen. In 2001, Fernandez-Vargas married the boy's mother, who is also a United States citizen. She soon filed a relative-visa petition on behalf of her husband, see 8 U.S.C. §§ 1154(a), 1151(b) (2000 ed.); see *Fernandez-Vargas* v. *Ashcroft,* 394 F.3d 881, 883, n. 4 (CA10 2005), on the basis of which he filed an application to adjust his status to that of lawful permanent resident, see § 1255(i). The filings apparently tipped off the authorities to his illegal presence here, and in November 2003, the Government began proceedings under § 241(a)(5) that eventuated in reinstating Fernandez-Vargas's 1981 deportation order, but without the possibility of adjusting his status to lawful residence. He was detained for 10 months before being removed to Juarez, Mexico in September 2004.

* * * *

III

Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* [*v. USI Film Products*, 511 U.S. 244 (1994)] at 280. . . .

* * * *

Fernandez-Vargas . . . argu[es] that Congress intended that INA § 241(a)(5) would not apply to illegal reentrants like him who returned to this country before the provision's effective date; and in any event, that application of the provision to such illegal reentrants would have an impermissibly retroactive effect, to be avoided by applying the presumption against it. We are not persuaded by either contention.

* * * *

A

. . . Common principles of statutory interpretation fail to unsettle the apparent application of § 241(a)(5) to any reentrant present in the country, whatever the date of return.

B

This facial reading is confirmed by two features of IIRIRA, not previously discussed, that describe the conduct to which § 241(a)(5) applies, and show that the application suffers from no retroactivity in denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States. One is in the text of that provision itself, showing that it applies to Fernandez-Vargas today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective. The second is the provision setting IIRIRA's effective date, § 309(a), 110 Stat. 3009-625, which shows that Fernandez-Vargas had an ample warning of the coming change in the law, but chose to remain until the old regime expired and § 241(a)(5) took its place.

* * * *

. . . Fernandez-Vargas could not only have chosen to end his continuing violation and his exposure to the less favorable law, he

even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility by leaving the country and ending his violation in the period between enactment of § 241(a)(5) and its effective date. IRRIRA became law on September 30, 1996, but it became effective and enforceable only on "the first day of the first month beginning more than 180 days after" IIRIRA's enactment, that is, April 1, 1997. § 309(a), 110 Stat. 3009-625. Unlawful alien reentrants like Fernandez-Vargas thus had the advantage of a grace period between the unequivocal warning that a tougher removal regime lay ahead and actual imposition of the less opportune terms of the new law. In that stretch of six months, Fernandez-Vargas could have ended his illegal presence and potential exposure to the coming law by crossing back into Mexico.[11] For that matter, he could have married the mother of his son and applied for adjustment of status during that period, in which case he would at least have had a claim (about which we express no opinion) that proven reliance on the old law should be honored by applying the presumption against retroactivity.

* * * *

Fernandez-Vargas did not, however, take advantage of the statutory warning, but augmented his past 15 years of unlawful presence by remaining in the country into the future subject to the new law, whose applicability thus turned not on the completed act of reentry, but on a failure to take timely action that would have avoided application of the new law altogether. To be sure, a choice to avoid the new law before its effective date or to end the continuing violation thereafter would have come at a high personal price, for Fernandez-Vargas would have had to leave a business and a family he had established during his illegal residence. But the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law. What Fernandez-Vargas complains of is

[11] . . . [A]ny period of inadmissibility is subject to waiver by the Attorney Genral, see § 1182(a)(6)(B)(1994 ed.); § 1182(a)(9)(A)(iii(2000 ed.), and presumably Fernandez-Vargas could plead his serious case for such a waiver (his marriage, his child) in seeking legal reentry to the United States.

01-Cummins-Chap01.indd 32 10/22/07 11:24:44 PM

the application of new law to continuously illegal action within his control both before and after the new law took effect. He claims a right to continue illegal conduct indefinitely under the terms on which it began, an entitlement of legal stasis for those whose law-breaking is continuous. But "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." L. Fuller, The Morality of Law 60 (1964) (quoted in *Landgraf,* 511 U.S., at 269, n. 24, 114 S. Ct. 1483, 128 L. Ed. 2d 229).

Because we concluded that §241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas, we affirm the judgment of the Court of Appeals.

c. Conviction for aggravated felony

(1) Felony under state law only

On December 5, 2006, the U.S. Supreme Court reversed and remanded a case in which the Ninth Circuit had upheld a removal order on the ground that the alien had been convicted of an aggravated felony. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006). Jose Antonio Lopez entered the United States illegally but became a legal permanent resident in 1990. In 1997 he pleaded guilty in South Dakota to aiding and abetting another person's possession of cocaine, a felony under South Dakota state law. After serving fifteen months in prison, he was released. At that time, the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security) began removal proceedings on the ground that his state conviction was a controlled substance violation (8 U.S.C. § 1227(a)(2)(B)(i)), and that it was also for an aggravated felony (§ 1227(a)(2)(A)(iii)). The Court granted certiorari to resolve a conflict in the circuit courts on this issue.

The Court stated at the outset:

The question raised is whether conduct made a felony under state law but a misdemeanor under the Controlled

Substances Act is a "felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). We hold it is not.

In so holding, the Court disagreed with the position of the United States in its brief on the merits filed in August 2006. The U.S. brief is available at *www.usdoj.gov/osg/briefs/2006/3mer/2mer/toc3index.html*.

Excerpts from the Court's analysis of the statutory framework follow (footnotes omitted).

---

* * * *

The Immigration and Nationality Act (INA) defines the term "aggravated felony" by a list that mentions "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." § 101(a)(43)(B), as added by § 7342, 102 Stat. 4469, and as amended by § 222(a), 108 Stat. 4320, 8 U.S.C. § 1101(a)(43)(B). The general phrase "illicit trafficking" is left undefined, but § 924(c)(2) of Title 18 identifies the subcategory by defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" or under either of two other federal statutes having no bearing on this case. Following the listing, § 101(a)(43) of the INA provides in its penultimate sentence that "the term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law" or, in certain circumstances, "the law of a foreign country." 8 U.S.C. § 1101(a)(43).

An aggravated felony on a criminal record has worse collateral effects than a felony conviction simple. Under the immigration statutes, for example, the Attorney General's discretion to cancel the removal of a person otherwise deportable does not reach a convict of an aggravated felony. § 1229b(a)(3). Nor is an aggravated felon eligible for asylum. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i). And under the sentencing law, the Federal Guidelines attach special significance to the "aggravated felony" designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for "any other felony." United States

Sentencing Commission, Guidelines Manual § 2L1.2 (Nov. 2005) (hereinafter USSG); id., comment., n. 3 (adopting INA definition of aggravated felony).

* * * *

The INA makes Lopez guilty of an aggravated felony if he has been convicted of "illicit trafficking in a controlled substance . . . including," but not limited to, "a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Lopez's state conviction was for helping someone else possess cocaine in South Dakota, which state law treated as the equivalent of possessing the drug, S. D. Codified Laws § 22-3-3, a state felony, § 22-42-5. Mere possession is not, however, a felony under the federal CSA, see 21 U.S.C. § 844(a). . . .

Despite this federal misdemeanor treatment, the Government argues that possession's felonious character as a state crime can turn it into an aggravated felony under the INA. There, it says, illicit trafficking includes a drug trafficking crime as defined in federal Title 18. Title 18 defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)," § 924(c)(2), and the CSA punishes possession, albeit as a misdemeanor, see § 405(a), 102 Stat. 4384, as renumbered and amended by § 1002(g), 104 Stat. 4828, 21 U.S.C. § 844(a). That is enough, says the Government, because § 924(c)(2) requires only that the offense be punishable, not that it be punishable as a federal felony. Hence, a prior conviction in state court will satisfy the felony element because the State treats possession that way.

There are a few things wrong with this argument, the first being its incoherence with any commonsense conception of "illicit trafficking," the term ultimately being defined. . . . [O]rdinarily "trafficking" means some sort of commercial dealing. . . . Commerce, however, was no part of Lopez's South Dakota offense of helping someone else to possess, and certainly it is no element of simple possession, with which the State equates that crime. Nor is the anomaly of the Government's reading limited to South Dakota cases: while federal law typically treats trafficking offenses as felonies and nontrafficking offenses as misdemeanors, several States deviate significantly from this pattern.

Reading § 924(c) the Government's way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect, and that result makes us very wary of the Government's position. . . . Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.

First, an offense that necessarily counts as "illicit trafficking" under the INA is a "drug trafficking crime" under § 924(c), that is, a "felony punishable under the [CSA]," § 924(c)(2). And if we want to know what felonies might qualify, the place to go is to the definitions of crimes punishable as felonies under the Act. . . . Unless a state offense is punishable as a federal felony it does not count.

* * * *

In sum, we hold that a state offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that federal law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

(2) Retroactive application

In October 2006 the U.S. Supreme Court denied petitions for certiorari to the U.S. Court of Appeals for the Fifth Circuit in two cases involving the retroactive application of statutory amendments making a removable alien ineligible for discretionary relief from removal if the alien was convicted of an aggravated felony. *Enrique Hernandez-Castillo v. Gonzales*, 127 S. Ct. 40 and *Sidhu v. Gonzales*, 127 S. Ct. 495 (2006). The United States opposed the grant of certiorari in both cases. *See* U.S. brief in *Hernandez-Castillo* (Case No. 05-1251) filed in the Supreme Court July 2006 and U.S. brief filed in September 2006 in *Sidhu* (Case No. 06-140), both available at *www.usdoj.gov/osg/briefs/2006/oresponses/toc3index.html*.

Excerpts below from the U.S. brief in *Hernandez-Castillo* provide the U.S. position, consistent with the Fifth Circuit

decisions, that the Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001)—that it would be impermissibly retroactive to apply the 1996 amendments to an alien convicted of an aggravated felony through a plea agreement—was inapplicable to an alien convicted of an aggravated felony after a trial, particularly where no plea agreement had been offered. Citations to the petition in the case have been omitted.

---

* * * *

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. *See* Pub. L. No. 101-649, Tit. V, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. *See* Pub. L. No. 104-132, Tit. V, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), *see* Pub. L. No. 104-208, Tit. III, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 1229b(a)(3).

In [*INS v. St. Cyr*, 533 U.S. 289 (2001)], this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section

212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. The question presented in this case is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony at trial.

* * * *

1. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a quid pro quo," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. *See also Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2431-2432 & n.10 (2006) (reaffirming the quid pro quo basis for the holding in *St. Cyr*).

In *Rankine v. Reno*, 319 F.3d 93, *cert. denied*, 540 U.S. 910 (2003), on which the decision below relied, the Second Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 319 F.3d at 99. As the court explained in *Rankine*, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* An alien who pleaded guilty made a decision "to abandon any rights and admit guilt—thereby immediately rendering [himself] deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Ibid.*

An alien who went to trial, by contrast, did so "to challenge the underlying crime that could render [him] deportable and, had [he] succeeded, § 212(c) relief would be irrelevant." *Id.* at 99-100. In short, as *Rankine* correctly recognized, it is "the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial" that "puts them on different footing than aliens like St. Cyr." *Id.* at 102.

2. The Second Circuit (in *Rankine*) and the Fifth Circuit (in this case) are not the only courts of appeals that have declined to extend the holding of *St. Cyr* to aliens convicted at trial. . . . And, contrary to petitioner's contention those decisions do not conflict with the Third Circuit's decision in *Ponnapula v. Ashcroft*, 373 F.3d 480 (2004).

While *Ponnapula* did address the question whether the 1996 amendments to the INA apply to aliens convicted of an aggravated felony at trial before 1996, it did not hold that the amendments do not apply to any alien convicted at trial. The Third Circuit . . . divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (1) "aliens who went to trial because they declined a plea agreement that was offered to them" and (2) "aliens who went to trial because they were not offered a plea agreement." *Ibid.* Since aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid.* The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.*

Petitioner was convicted of an aggravated felony at trial, but he did not decline a plea agreement. . . . With respect to aliens who were convicted of an aggravated felony at trial before the 1996 amendments to the INA and did not decline a plea agreement, there is no conflict between the decision below and *Ponnapula* on the question whether application of the 1996 amendments would be impermissibly retroactive.

* * * *

2. Modifications in Procedures Related to Cuban Migrants

a. Family reunification

On August 11, 2006, the Department of Homeland Security announced a change in policy to reduce a backlog in Cuban migrants admitted to the United States for family reunification. The full text of the press release, excerpted below, is available at *www.dhs.gov/xnews/releases/pr_1158350356206.shtm*.

---

* * * *

Impact of Family Reunification Policy

Immigration processing in Cuba is regulated by the September 4, 1994, Joint Communique between the U.S. government and the government of Cuba. This document allows the United States to process a minimum of 20,000 migrants for travel to the United States each year. Historically, three classes have made up the 20,000 goal: (1) those who receive family-based immigrant visas, (2) those who receive refugee protection, and (3) those who receive discretionary parole under the Special Cuban Migration Program (SCMP), referred to as the Cuban Lottery.

Each year, however, there is a significant backlog of individuals who have applied for family-based immigrant visas that are not available to be issued. Today's plan aims to reduce this backlog by recognizing these individuals as a fourth class of migrants. In addition to Cuban Lottery winners, we will also exercise our discretion to parole such individuals into the United States.

Under this new policy, family reunification parolees will make up approximately 60 percent of the discretionary paroles granted each year with Lottery winners making up the remaining approximately 40 percent. . . .

* * * *

Background on Three Historic Cuban Migration Classes

- **Family-Based Immigrant Visas**
  The Immigration and Nationality Act provides Lawful Permanent Resident and United States Citizen family members the right to immigrate family members to the United States. Because there are annual worldwide and other limitations on the number of available visas, in some instances, family members wait for long time periods outside of the United States until a visa is available for use.
- **Refugee Program**
  The United States is committed to providing protection to persons who flee persecution in their home countries. The United States provides in-country processing for approximately 5,000 refugees in Cuba annually. The United States is committed both through international treaty and through domestic policy to upholding the principles of the United States Refugee Program.
- **Lottery/Special Cuban Migration Program**
  The lottery system was created in 1994 and has had three open seasons for registry. To qualify Cubans must be between 18 and 55 years of age and have two of the following three characteristics: (1) completion of higher level education or secondary education, (2) three years of work experience, or (3) relatives in the U.S. Participants are randomly selected and are paroled into the United States.

b. Medical personnel in third countries

On the same date DHS announced that it would "allow certain Cuban medical personnel in third countries (that is, not in Cuba or the United Sates) to apply for parole at a U.S. Embassy or Consulate." A fact sheet released September 19, 2006, provided further information as excerpted below.

The full text of the fact sheet is available at *www.uscis.gov/files/pressrelease/CubanMedPrf091906.pdf*.

* * * *

- To qualify for consideration of parole, individuals must meet the following criteria:

  - Must be a Cuban national or citizen.
  - Must be a medical professional currently conscripted to study or work in a third country under the direction of the Government of Cuba.
  - Must be admissible into the United States.

  The spouse and minor children of individuals meeting the above criteria may also be included. These family members may be present with the medical professional in a third country or may be residing in Cuba.

- Interested individuals will be required to submit Department of State forms DS-156, DS-157, and DS-158 as well as proof of nationality and profession. This may include but is not limited to: a Cuban passport, host country work visa, birth certificate, marriage certificate, educational or professional certificates, Cuban identity card (Carnet), work orders from the Government of Cuba and relevant host country documentation.

* * * *

- Information on applying for family members in Cuba will be forthcoming in the future.

3. Suspension of Entry Under INA Section 212(f)

On May 12, 2006, President George W. Bush issued Proclamation 8015, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or

Actions that Threaten the Transition to Democracy in Belarus." 71 Fed. Reg. 28,541 (May 16, 2006). Section 212(f) of the INA provides in pertinent part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Excerpts from Proclamation 8015 follow.

In light of the importance to the United States of fostering democratic institutions in Belarus in order to help the Belarusian people achieve their aspirations for democracy and to help complete the transformation to a Europe whole, free, and at peace and given the suppression of human rights and democracy in Belarus, the fraud perpetrated during the recent Belarusian presidential campaign and election, the detention of peaceful protesters in Belarus, the persistent acts of corruption by Belarusian government officials in the performance of public functions, and the continued failure of Alyaksandr Lukashenka, Belarusian government officials, and others to support the rule of law, human rights commitments, and other principles of high priority to the United States, I have determined that it is in the interest of the United States to take all available measures to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants, of members of the government of Alyaksandr Lukashenka and others detailed below who formulate, implement, participate in, or benefit from policies or actions, including electoral fraud, human rights abuses, and corruption, that undermine or injure democratic institutions or impede the transition to democracy in Belarus.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by the Constitution and laws of the United States, including section 212(f)

of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in sections 2 and 3 of this proclamation, be detrimental to the interests of the United States.

I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Members of the government of Alyaksandr Lukashenka and other persons who formulate, implement, participate in, or benefit from policies or actions, including electoral fraud, human rights abuses, or corruption, that undermine or injure democratic institutions or impede the transition to democracy in Belarus;

(b) Persons who through their business dealings with Belarusian government officials derive significant financial benefit from policies or actions, including electoral fraud, human rights abuses, or corruption, that undermine or injure democratic institutions or impede the transition to democracy in Belarus; and

(c) The spouses of persons described in paragraphs (a) and (b) above.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where entry of such person would not be contrary to the interest of the United States.

Sec. 3. Persons covered by sections 1 and 2 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such procedures as the Secretary may establish under section 5 of this proclamation.

Sec. 4. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements.

* * * *

4. Continued Detention of Un-admitted Alien Ordered Removed

On September 11, 2006, a magistrate judge recommended the release of Luis Posada-Carriles, who was being held in detention pending removal, on the ground that there was no significant likelihood that he could be removed from the United States within the reasonably foreseeable future. *Posada-Carriles v. Campos*, No. EP-06-CA-0130-PRM (D.W.D. Tex.). On October 5, 2006, the United States filed in the U.S. District Court for the Western District of Texas objections to the magistrate judge's report and recommendation, concluding:

> . . . [T]he Court should grant the Government's motion to dismiss the habeas petition for lack of jurisdiction. Alternatively, the Court should enforce the burden-shifting framework set forth in *Zadvydas* and applied by this Court in *Abdulle*, and provide the agency additional time to present a rebuttal case. Should the Court deny these requests, however, the Court should provide the Government an opportunity to consider and brief Posada's further detention under 8 C.F.R. § 241.14(c).

Attached to the U.S. submission was an Interim Decision to Continue Detention, dated October 5, 2006. The full texts of the U.S. Objections To The Magistrate Judge's September 11, 2006 Report and Recommendation, with the attached Interim Decision, as well as the U.S. Response to Posada's Reply to Respondents' Objections, filed October 13, 2006, are available at *www.state.gov/s/l/c8183.htm*.

On November 2, 2006, the court issued a Show Cause Order requiring the United States within ninety days to complete the review proceedings initiated on October 5, 2006, under 8 C.F.R. §§ 241.13(e)(6) and 241.14, and to inform the court of its conclusion as to whether to apply the authority of section 241.14(c). The case was pending at the end of 2006. The full text of the Show Cause Order is available at *www.state.gov/s/l/c8183.htm*.

Excerpts follow from the October 5 submission of the United States.

---

* * * *

Posada entered the United States illegally in March 2005, and for nearly two months evaded the Government's attempts to apprehend and charge him with removal as an un-admitted alien. Posada was arrested by Immigration and Customs Enforcement ("ICE"), on May 17, 2005, and placed in removal proceedings where he initially sought asylum. He later withdrew that application, conceding further that he was ineligible for the relief of withholding of removal because he had committed a serious non-political crime outside the United States. Exh. B (*Amended Decision of the Immigration Judge*, September 27, 2005), at 1-2, attached to the Government's Motion To Dismiss the Habeas Petition ("Motion to Dismiss"). Posada was ordered removed from the United States on September 27, 2005, but granted deferral of removal under the Convention Against Torture to Cuba and Venezuela—a temporary form of relief which does not preclude the Government from removing him to other destinations, and which, on a proper showing, may be terminated even as to Cuba and Venezuela.

It is undisputed that Posada remains an un-admitted alien with no entitlement to be in the United States. Nor, apart from a general denial, does Posada seriously dispute that he poses a risk of flight, danger to the community, and danger to the national security. Rather, in his petition, Posada seeks release under the misconception that the Supreme Court's decision in *Zadvydas* [*v. Davis*, 533 U.S. 678 (2001)] would compel his release, because he asserts that he has been detained beyond the time period reasonably necessary to effectuate his removal.

The Government moved to dismiss the habeas petition on two grounds. First, although Posada asserted in his petition that he poses no risk of flight or danger to the community or national security, the Court lacks jurisdiction to review the agency's discretionary findings to the contrary, because they entail factual and discretionary judgments which lie outside the scope of habeas

01-Cummins-Chap01.indd 46 10/22/07 11:24:46 PM

review. Second, the petition should be dismissed as unripe because Posada failed to show, as required under *Zadvydas*, a "good reason to believe" that there is no significant likelihood that he could be removed in the reasonably foreseeable future. 533 U.S. at 701.

* * * *

As to Posada's *Zadvydas* burden, the magistrate judge observed that the "information regarding [Posada's] many potential contacts undercut his contention that his removal was not reasonably foreseeable." R&R at 16-17. He nonetheless agreed with Posada that "both his and the government's efforts in obtaining removal documents have failed." Id. at 17.

* * * *

"Once Petitioner meets his burden," the magistrate judge said, "the Respondents are required to respond with sufficient evidence to rebut that showing." Id. (citing *Zadvydas*, 533 U.S. at 701). However, the magistrate judge found that the Government presented no evidence to show that any "action has been taken in the last nine months to procure travel documents." Thus, he concluded that Posada's "removal is remote at best," *id.* (citing *Gui*, 2004 WL 1920719 at *6), and that he had met his burden under *Zadvydas*.

The magistrate judge observed that statutory and regulatory mechanisms exist for detaining an alien who presents "issues of terrorism, special circumstances, or matters of national security," when removal is not foreseeable. *Id.* at 20-22 (quoting *Zadvydas*, 533 U.S. at 696) (internal quotations omitted). He cited: (1) 8 U.S.C. § 1226a, authorizing continued detention for additional periods of up to six months of any alien whose removal is not reasonably foreseeable and who has engaged in terrorist activities, or otherwise presents a threat to the national security; (2) 8 U.S.C. §§ 1531-1537, authorizing the detention of alien terrorists, based upon classified information, during proceedings in the Alien Terrorist Removal Court; and (3) the continued detention, under 8 C.F.R. §§ 241.14(c) & (d), of aliens whose release would pose serious adverse foreign policy consequences for the United States, or who present national security or terrorism concerns. R&R at 20-22.

He noted that the Government has "not moved to detain Petitioner under any" of these authorities thus far. *Id.* at 22.

* * * *

If the alien's burden under *Zadvydas* is to have any meaning, it must require more than conclusory statements, unverified assertions, and unexplained failures to pursue previously outlined prospects for removal. In a recent application of the *Zadvydas* framework, the Fifth Circuit observed that "[t]he alien bears the initial burden of proof in showing that no such likelihood of removal exists," and held that the alien could not meet that burden through "conclusory statements suggesting that he will not be immediately removed to Cape Verde." *Andrade v. Gonzales*,— F.3d—, 2006 WL 2136397 at *3 (5th Cir., Aug. 1, 2006). *Andrade* involved an alien "detained for more than three years at the time his habeas appeal," and the Fifth Circuit decided that he may nonetheless be held "'in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Id.* (citing 533 U.S. at 701).

Andrade is instructive not only because Posada's conclusory evidence should be similarly rejected, but also because *Andrade* involved an alien with only one country as a removal option. Posada's multiple, as-yet unexhausted options, should thus increase his burden because the Supreme Court recognized the need for a flexible application of the burden in relation to the circumstances presented in each individual case. *See* 533 U.S. at 701 (construing the presumptive period from "practical[] necess[ity]," and observing that the Ninth Circuit erred by resting its release decision "solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations").

. . . It was not Posada's failure to provide information, but the significance of information he provided (and his subsequent failure to follow through) that disables his *Zadvydas* showing. The Fifth Circuit has cautioned against effectively allowing the alien to control the outcome of his custody review by, for example, manipulating the success of his own efforts to his advantage. . . . Yet that is precisely what the magistrate judge is allowing Posada to do in

this case by accepting his deficient efforts and unsupported statements.

In sum, this Court, on de novo consideration of this record, must find that Posada has not met his *Zadvydas* burden, and as such, that the petition must be dismissed for lack of jurisdiction.

* * * *

4. In the Absence of a Jurisdictional Dismissal, Or a Rebuttal Opportunity, The Court Should Grant the Government Time To Consider Continued Detention Under the Regulations Authorizing Detention In Special Circumstances

Should the Court decline the foregoing arguments, it should nonetheless grant the Government time to consider the post-*Zadvydas* regulatory framework under which an alien may be detained under special circumstances implicating national security and foreign policy concerns. *See* 8 C.F.R. §§ 241.14(c), 241.13(e)(6); *see also* Attachment A (Interim Decision to Continue Custody) (including notification to Posada that review proceedings have been initiated to determine whether he may be further detained under § 241.14(c) because his release would pose a serious adverse foreign policy consequence for the United States). Exercise of this authority would moot the claims raised in this petition.

Regulations promulgated in the wake of the *Zadvydas* decision provide for the orderly analysis of first, removal prospects, and second, for continued custody while the Government considers whether an alien whose removal is not reasonably foreseeable should be continued in custody under one of multiple authorities in 8 C.F.R. § 241.14. The magistrate judge's Report and Recommendation addressed only the first issue and left open the possibility of detention under 8 C.F.R. § 241.14. R&R 20-22. Following the magistrate judge's Report and Recommendation and out of an abundance of caution, DHS initiated the procedures for considering whether Posada's custody should be continued under such regulation. On October 5, 2006, it notified Posada of its Interim Decision to Continue Custody and its commencement of the procedures provided in 8 C.F.R. § 241.14. *See* Attachment

A (Interim Decision To Continue Custody, including notification to Posada of the commencement of procedures under 8 C.F.R. § 241.14); *see also* 8 C.F.R. § 241.13(e)(6). The regulations provide that in appropriate cases ICE "may initiate review proceedings under § 241.14 before completing the HQPDU review under this section [241.13]." 8 C.F.R. § 241.13(e)(6). They further require ICE to continue the detention of any alien "for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated." 8 C.F.R. § 241.13(b)(2)(i). Thus, the regulations require preservation of the status quo in cases where a final determination has not yet been made on whether the alien's removal is not significantly likely under the *Zadvydas* analysis and accompanying regulations, but where special circumstances in the alien's case may require his continued detention pursuant to the special provisions in 241.14, should a final determination be made that his removal is not likely in the reasonably foreseeable future. *Id.* (providing that ICE "shall continue in custody any alien" for whom there is no significant likelihood of removal, pending a further determination on whether such an alien's detention is required under the special circumstances provided in § 241.14).

Thus, ICE initiated review proceedings regarding Posada under 8 C.F.R. § 241.14(c), one of the authorities for continued custody referenced in the magistrate judge's decisions. *See* R&R at 20-22. Accordingly, should this Court order Posada's release upon a finding that there is no significant likelihood of removal in the reasonably foreseeable future, the contingent custody authority provided under the regulations will take effect. The activation of that authority, moreover, will moot the claims in the instant petition because they only challenge the prior custody basis. *See Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

5. Secure Fence Act and Comprehensive Immigration Reform

On October 26, 2006, President Bush signed into law The Secure Fence Act of 2006, Pub. L. No. 109-367, 102 Stat. 2638. A fact sheet released by the White House on that date stated that the Secure Fence Act is one part of the President's

"strategy for comprehensive immigration reform." *See www.whitehouse.gov/news/releases/2006/10/20061026-1.html.* Excerpts follow from the fact sheet, describing the act and other aspects of the strategy.

The Secure Fence Act Builds On Progress Securing The Border

By Making Wise Use Of Physical Barriers And Deploying 21st Century Technology, We Can Help Our Border Patrol Agents Do Their Job And Make Our Border More Secure. The Secure Fence Act:

- Authorizes the construction of hundreds of miles of additional fencing along our Southern border;
- Authorizes more vehicle barriers, checkpoints, and lighting to help prevent people from entering our country illegally;
- Authorizes the Department of Homeland Security to increase the use of advanced technology like cameras, satellites, and unmanned aerial vehicles to reinforce our infrastructure at the border.

* * * *

This Act Is One Part Of Our Effort To Reform Our Immigration System, And We Have More Work To Do

Comprehensive Immigration Reform Requires That We Enforce Our Immigration Laws Inside America. It is against the law to knowingly hire illegal workers, so the Administration has stepped up worksite enforcement. Many businesses want to obey the law, but cannot verify the legal status of their employees because of the widespread problem of document fraud, so the President has also called on Congress to create a better system for verifying documents and work eligibility.

Comprehensive Immigration Reform Requires That We Reduce The Pressure On Our Border By Creating A Lawful Path For Foreign Workers To Enter Our Country On A Temporary Basis. A temporary worker program would meet the needs of our economy,

reduce the appeal of human smugglers, make it less likely that people would risk their lives to cross the border, and ease the financial burden on State and local governments by replacing illegal workers with lawful taxpayers. Above all, a temporary worker program would add to our security by making certain we know who is in our country and why they are here.

Comprehensive Immigration Reform Requires That We Face The Reality That Millions Of Illegal Immigrants Are Here Already. The President opposes amnesty but believes there is a rational middle ground between granting an automatic path to citizenship for every illegal immigrant and a program of mass deportation. Illegal immigrants who have roots in our country and want to stay should have to pay a meaningful penalty for breaking the law, pay their taxes, learn English, work in a job for a number of years, and wait in line behind those who played by the rules and followed the law.

Comprehensive Immigration Reform Requires That We Honor The Great American Tradition Of The Melting Pot. Americans are bound together by our shared ideals, an appreciation of our history, respect for the flag we fly, and an ability to speak and write the English language. When immigrants assimilate and advance in our society, they realize their dreams, renew our spirit, and add to the unity of America.

D. REFUGEES AND ASYLUM

1. Refugees

a. Resettlement of certain Burmese refugees

On three occasions in 2006, Secretary of State Condoleezza Rice exercised her discretionary authority to determine that § 212(a)(3)(B)(i)(I) of the Immigration and Nationality Act ("INA") "shall not apply with respect to material support" provided to named terrorist organizations by certain Burmese refugees. The exercise of the waiver authority allows approval of otherwise eligible refugees who meet all other requirements

for resettlement under the U.S. Refugee Admissions Program, including that they pose no danger to the safety and security of the United States.

(1) Karen refugees

On May 5, 2006, Secretary Rice exercised her authority to determine that Karen refugees from Burma in Tham Hin Camp in Thailand are not inadmissible to the United States for having provided material support to the Karen National Union or Karen National Liberation Army. Excerpts from the Secretary's determination follow; the full text is available at *www.state.gov/s/l/c8183.htm*.

In furtherance of the foreign policy interests of the United States, following consultations with the Secretary of Homeland Security and the Attorney General, I hereby conclude, as a matter of discretion in accordance with the authority granted to me by Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act ("the Act"), considering the foreign policy and national security interests that I deem relevant, that subsection 212(a)(3)(B)(iv)(VI) of the Act shall not apply with respect to material support provided to the Karen National Union or Karen National Liberation Army by persons who:

(a) Are Karen refugees from Burma in Tham Hin Camp in Thailand at the time they are interviewed at that camp as applicants for resettlement in the United States under the United States Refugee Admissions Program;
(b) Have undergone and passed relevant background and security checks; and
(c) Fully disclose to the Department of Homeland Security ("DHS") adjudicator, when they are interviewed at Tham Hin camp, the nature and circumstances of each provision of material support.

Implementation of this determination to particular applicants for refugee admission will be made by the DHS adjudicator interviewing

applicants for resettlement in the United States under the United States Refugee Admissions Program, who shall ascertain, to the adjudicator's satisfaction, that the particular applicant meets the criteria set forth above.

This exercise of authority is effective only for the purposes of a determination of the eligibility of refugee applicants for resettlement in the United States and subsequent adjustment of status of the same individuals. The Secretary of State may revoke this exercise of authority as a matter of discretion and without notice at any time with respect to any and all persons subject to it.

This exercise of authority shall not be construed to prejudice, in any way, the ability of the United States Government to commence subsequent criminal or immigration proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority is not intended to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

This exercise of authority shall apply only to Karen refugee applicants in Tham Hin Camp in Thailand who have been found to meet all other requirements for access to and eligibility for the United States Refugee Admissions Program pursuant, *inter alia*, to an interview by a DHS adjudicator regarding the eligibility for refugee resettlement in the United States. Among other requirements, the DHS adjudicator must determine that the alien poses no danger to the safety and security of the United States.

* * * *

This determination is based on my assessment related to the foreign policy interests of the United States as they apply to this particular population of Karen refugee applicants in Tham Hin Camp in Thailand and shall not have any application with respect to other persons or to other provisions of U.S. law.

On August 24, 2006, Secretary Rice signed a second determination that expanded the application of the May 5 determination to apply also to "Karen refugees from Burma living in Ban Don Yang, Mae La, Umpiem Mai, No Po, Mai Kong Kha,

and Mae Ra Ma Luang camps in Thailand at the time they are interviewed in Thailand as applicants for resettlement in the United States under the United States Refugee Admissions Program." The full text of the August 24 document is available at *www.state.gov/s/l/c8183.htm*.

(2) Chin refugees

On October 11, 2006, Secretary Rice also determined that subsection 212(a)(3)(B)(iv)(VI) of the INA "shall not apply with respect to material support provided to the Chin National Front or the Chin National Army by persons who "are Chin refugees from Burma living in Malaysia, India or Thailand at the time they are interviewed in those locations as applicants for resettlement in the United States under the United States Refugee Admissions Program." The language of the determination was identical, *mutatis mutandi*, to the language of the determination for the Karen refuges, *supra*. The full text of the Secretary's determination for the Chin refugees is available at *www.state.gov/s/l/c8183.htm*.

b. Presidential determination and authorization for refugees in fiscal year 2007

On October 11, 2006, President George W. Bush issued Presidential Determination No. 2007-1 "Presidential Determination on FY 2007 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended." 71 Fed. Reg. 64,435 (Nov. 1, 2006). The determination, issued as a memorandum to the Secretary of State, is excerpted below.

In accordance with section 207 of the Immigration and Nationality Act (the "Act") (8 U.S.C. 1157), as amended, and after appropriate

consultations with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 70,000 refugees to the United States during FY 2007 is justified by humanitarian concerns or is otherwise in the national interest; provided, however, that this number shall be understood as including persons admitted to the United States during FY 2007 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below. The ceiling shall be construed as a maximum not to be exceeded, and not a minimum to be achieved.

* * * *

Additionally, upon notification to the Judiciary Committees of the Congress, you are further authorized to transfer unused admissions allocated to a particular region to one or more other regions, if there is a need for greater admissions for the region or regions to which the admissions are being transferred. Consistent with section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, as amended, I hereby determine that assistance to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose.

Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101(a)(42)) and after appropriate consultation with the Congress, I also specify that, for FY 2007, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

a. Persons in Vietnam
b. Persons in Cuba
c. Persons in the former Soviet Union
d. In exceptional circumstances, persons identified by a United States Embassy in any location.

c. Democratic People's Republic of Korea (North Korea)

On September 27, 2006, Assistant Secretary of State for Population, Refugees, and Migration Ellen Sauerbrey testified

before the Senate Judiciary Committee Subcommittee on Immigration, Border Security and Citizenship, on the President's refugee admissions program for fiscal year 2007. Among other things, she addressed North Korean refugees, reporting that "having overcome some significant obstacles, this year, we admitted the first nine North Korean refugees since the passage of the North Korean Human Rights Act. While we expect that most North Koreans seeking refuge will continue to resettle in the Republic of Korea, we are pleased to contribute to this humanitarian effort and are working to ensure that more will be admitted here in the coming year." The full text of her testimony is available at *www.state.gov/g/prm/rls/2006/73264.htm*.

A fact sheet issued by the Department of State on March 3, 2006, "Frequently Asked Questions About the Refugee Aspects of the North Korean Human Rights Act," is excerpted below. The full text of the fact sheet is available at *www.state.gov/g/prm/rls/fs/2006/62761.htm*.

The North Korean Human Rights Act of 2004 (NKHRA), signed by the President on October 18, 2004, seeks to address the serious human rights situation in North Korea and promote durable solutions for refugees, transparency in the provision of humanitarian assistance, a free flow of information, and progress towards the peaceful reunification on the Korean peninsula.

The following are some frequently asked questions about the refugee-specific aspects of the NKHRA:

1. What is the United States doing to protect and assist North Korean refugees?

The United States has long been concerned about the plight of North Korean refugees. The United States vigorously and consistently urges China to adhere to its international obligations as a party to the 1951 Refugee Convention and its 1967 Protocol by not repatriating North Koreans to the DPRK before allowing the UNHCR access to individual members of this vulnerable population. The United States regularly discusses its concerns with China and other governments as well as with the UNHCR and concerned non-governmental and private groups.

Following the enactment of the NKHRA, U.S. embassies in Asia assessed the feasibility of funding new humanitarian assistance programs for North Koreans and establishing refugee admissions programs. . . . A Special Envoy on Human Rights in North Korea was appointed in fall 2005 to coordinate and promote efforts to improve respect for the fundamental human rights of the people of North Korea.

2. What is the purpose of the Act?

The NKHRA seeks to address the serious human rights situation in North Korea, promote durable solutions for refugees, transparency in the provision of humanitarian assistance, a free flow of information, and progress towards peaceful reunification on the Korean peninsula.

3. What access do North Koreans have to the United States refugee admissions program?

Section 303 of the NKHRA provides that the Secretary of State shall "undertake to facilitate the submission of applications" by citizens of North Korea seeking protection as refugees. The procedures to consider a North Korean national for U.S. resettlement are the same as for nationals from other countries. The United Nations High Commissioner for Refugees (UNHCR) and U.S. Embassies and Consulates are encouraged to bring appropriate cases to our attention. Reputable non-governmental organizations (NGOs) can also raise cases with us. As with all refugee cases, host government concurrence is required before we can process a refugee on another country's territory.

4. How will the State Department process North Korean refugees overseas?

We will process North Korean refugees in the same way we process all refugees. As always, this assumes host government concurrence. A caseworker from one of our Overseas Processing Entities (OPE) will interview the applicant to verify the individuals' biographical data and document their persecution claim. The OPE will submit the biographical information to the Refugee Processing Center (RPC) in Washington D.C. and request that the applicant's name be screened for security purposes. Once the security check is

complete, an officer from the Department of Homeland Security/ Citizenship Immigration Services (DHS/CIS) will interview the applicant to verify that he/she meets the refugee definition and is admissible to the U.S. If DHS/CIS approves the case, the applicant will undergo a medical screening. Next the OPE will submit a request to the RPC for one of ten resettlement agencies in the U.S. to sponsor the case. Finally, depending on the location and logistical considerations, the refugee may receive cultural orientation to familiarize him/her with the basics of life in the U.S. After all of the above mentioned steps are completed, the OPE will put together a travel packet that will allow the refugee to enter the U.S. The length of time it will take to complete all the processing steps will vary from case to case.

* * * *

8. What reports are required under the NKHRA?

The Act mandates six reports and requires the State Department to add supplemental information to an existing annual report. Three one-time required reports on the status of North Korean refugees, radio broadcasting in North Korea, and humanitarian assistance inside North Korea were submitted to Congress in February 2005. Additional annual reports cover the activities of the Special Envoy on North Korean Human Rights (due April 15), humanitarian assistance for North Koreans (due April 15), actions to promote freedom of information (due October 18), and North Korean immigration information (due October 18). Information on access to the U.S. for those who have fled countries of particular concern will be added to the annual report to Congress on the President's Proposal for refugee admissions in the coming fiscal year. This report is normally issued no later than mid-September.

d. Termination of Liberian eligibility for family reunification refugee admissions processing

On March 13, 2006, the Bureau of Population, Refugees, and Migration, U.S. Department of State, announced that, "[g]iven

that conditions in Liberia have changed significantly and that refugees now are able to return home with assistance provided by the international community, Priority-3 (family reunion) eligibility for Liberians will end as of September 30, 2006. After that date, no new Affidavits of Relationship (AORs) will be accepted from Liberian nationals." *See* fact sheet available at *www.state.gov/g/prm/rls/fs/2006/63068.htm*.

2. Asylum: Uzbek Asylum Seekers

On February 14, 2006, the United States condemned the forcible return of ten Uzbek asylum seekers to Uzbekistan by Ukrainian authorities on February 14, 2006. *See* Department of State press statement dated February 28, 2006, available at *www.state.gov/r/pa/prs/ps/2006/62250.htm*. The press statement continued:

> These individuals apparently were returned to Uzbekistan without passing through the full asylum application process under Ukrainian law, including the ability to appeal their asylum determinations. Ukrainian authorities also ignored the United Nations High Commissioner for Refugees' (UNCHR) request for official guarantees not to forcibly return any of them until after proper Ukrainian asylum application procedures had been followed.
>
> Ukraine, like the United States, is a State Party to the 1967 Protocol Relating to the Status of Refugees. We call on the Government of Ukraine to cooperate fully with UNHCR and to honor their treaty commitments whenever they are confronted with claims of asylum.

On March 21, 2006, a press statement released by the Department of State condemned the closure of the UNHCR office in Uzbekistan and voiced concern with forcible return of Uzbek asylum seekers from Kyrgyzstan and Kazakhstan as well as Ukraine. The statement is set forth below and available at *www.state.gov/s/l/c8183.htm.*

The United States condemns the Government of Uzbekistan's decision to shut down offices of the United Nations High Commissioner for Refugees (UNHCR). We call on the Government of Uzbekistan to rescind this order and allow UNHCR to continue protecting and assisting refugees and asylum seekers in Uzbekistan.

We also remain concerned about the fate of approximately eighteen Uzbek asylum seekers that have been forcibly returned to Uzbekistan from Kyrgyzstan, Kazakhstan and Ukraine. UNHCR has not been granted access to these individuals despite repeated requests, and the Government of Uzbekistan continues to pressure other governments in the region to forcibly return Uzbek asylum seekers to Uzbekistan.

We call on all governments in the region currently detaining Uzbek asylum seekers to refrain from forcibly returning them to Uzbekistan, and to recognize the right of such individuals to seek protection from persecution.

Cross References

Removal of Maher Arar, **Chapter 6.I.2.c**
Absence of non-refoulement obligation under ICCPR, **Chapter 6.A.4.b.**
Applicability of Convention against Torture to removal, **Chapter 6.A.4.b., F.2.b., and I.2.c.**
Executive branch authority over foreign state recognition and passports, **Chapter 9.B.**
Detention of aliens in military context, **Chapter 18.A.4.**
Case requesting court to order parole of alien in Guantanamo into United States, **Chapter 18.A.4.d.(2)**

01-Cummins-Chap01.indd 62 10/22/07 11:24:48 PM

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Consular Notification

a. Suppression of evidence and change of procedural default rule as remedies for U.S. violation of obligation

On June 28, 2006, the U.S. Supreme Court held that, even assuming without deciding, that the Vienna Convention on Consular Relations ("VCCR") creates judicially enforceable rights, remedies urged by petitioners were not warranted. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). Moises Sanchez-Llamas, a Mexican national, made several incriminating statements when arrested following a shootout with police. Before trial, he moved to suppress the statements, arguing that he had made them involuntarily and the authorities had failed to inform him that he had the right to request that the Mexican consulate be informed of his detention as provided under Article 36 of the VCCR. Mario Bustillo, petitioner in *Bustillo v. Johnson,* consolidated on appeal in the Supreme Court, is a Honduran national who made similar claims concerning failure to inform him of his right to consular notification when he was arrested in Virginia. Bustillo first raised the argument, however, when he filed a petition for a writ of habeas corpus in state court after his conviction became final. In that case, the state habeas court found

02-Cummins-Chap02.indd 63 10/22/07 11:27:02 PM

Bustillo's VCCR claim "'procedurally barred' because he had failed to raise the issue at trial or on appeal."

The Court summarized the issues and its decision as follows:

> These consolidated cases concern the availability of judicial relief for violations of Article 36. We are confronted with three questions. First, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? Second, does a violation of Article 36 require suppression of a defendant's statements to police? Third, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial? We conclude, even assuming the Convention creates judicially enforceable rights, that suppression is not an appropriate remedy for a violation of Article 36, and that a State may apply its regular rules of procedural default to Article 36 claims. We therefore affirm the decisions below.

Four justices would have found that "[a] criminal defendant may, at trial or in a postconviction proceeding, raise the claim that state authorities violated the Convention in his case," an issue that the majority did not decide. Three of the four justices would also have found that "*sometimes* state procedural default rules must yield to the Convention . . ." and that "suppression may *sometimes* provide an appropriate remedy." (Emphasis in the original.)

Excerpts below from the majority opinion's analysis in reaching its conclusions address, among other things, the role of treaties and decisions of the International Court of Justice in U.S. courts. *See also* Brief For the United States as *Amicus Curiae* Supporting Respondents, filed January 2006 in this case, available at *www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0051.mer.ami.html*.

* * * *

As a predicate to their claims for relief, Sanchez-Llamas and Bustillo each argue that Article 36 grants them an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification. Respondents and the United States, as *amicus curiae,* strongly dispute this contention. They argue that "there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts." Brief for United States 11; *ibid.* (quoting *Head Money Cases,* 112 U.S. 580, 598, 5 S. Ct. 247, 28 L. Ed. 798 (1884) (a treaty "'is primarily a compact between independent nations,'" and "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it'")). Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.

. . . The Convention does not prescribe specific remedies for violations of Article 36. Rather, it expressly leaves the implementation of Article 36 to domestic law: Rights under Article 36 are to "be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S.T., at 101. As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.

It would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation. . . . More than 40 years after the drafting of the Convention, the automatic exclusionary rule applied in our courts is still "universally rejected" by other countries. . . . It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. There is no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention.

* * * *

To the extent Sanchez-Llamas argues that we should invoke our supervisory authority, the law is clear: "It is beyond dispute that we do not hold a supervisory power over the courts of the several States." *Dickerson* v. *United States,* 530 U.S. 428, 438, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); . . .

We also agree with the State of Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself. Under the Constitution, the President has the power, "by and with the Advice and Consent of the Senate, to make Treaties." Art. II, § 2, cl. 2. The United States ratified the Convention with the expectation that it would be interpreted according to its terms. See Restatement (Third) of Foreign Relations Law of the United States § 325(1) (1986) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). If we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. Cf. *The Amiable Isabella,* 19 U.S. 1, 6 Wheat. 1, 71, 5 L. Ed. 191 (1821) (Story, J.) ("To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. See, *e.g.*, *Hauenstein* v. *Lynham,* 100 U.S. 483, 25 L. Ed. 628 (1880). And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law. Cf. 18 U.S.C. § 2515; *United States* v. *Giordano,* 416 U.S. 505, 524-525, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.

02-Cummins-Chap02.indd 66 10/22/07 11:27:03 PM

. . . [T]here is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions. See Department of State Answers to Questions Posed by the First Circuit in *United States* v. *Nai Fook Li*, No. 97-2034 etc., p. A-9 (Oct. 15, 1999) ("We are unaware of any country party to the [Vienna Convention] that provides remedies for violations of consular notification through its domestic criminal justice system").

[T]he Convention . . . states that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S. T., at 101. Under our domestic law, the exclusionary rule is not a remedy we apply lightly. "Our cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd. of Probation and Parole* v. *Scott,* 524 U.S. 357, 364-365, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). Because the rule's social costs are considerable, suppression is warranted only where the rule's "'remedial objectives are thought most efficaciously served.'" *United States* v. *Leon*, 468 U.S. 897, 908, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (quoting *United States* v. *Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

We have applied the exclusionary rule primarily to deter constitutional violations. In particular, we have ruled that the Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment, . . . and confessions exacted by police in violation of the right against compelled self-incrimination or due process. . . .

The few cases in which we have suppressed evidence for statutory violations do not help Sanchez-Llamas. In those cases, the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests. . . .

The violation of the right to consular notification, in contrast, is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not

to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Moreover, the reasons we often require suppression for Fourth and Fifth Amendment violations are entirely absent from the consular notification context. We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable. . . . We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement. . . . The situation here is quite different. The failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. And unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation.

* * * *

. . . A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination. See *Wong Wing* v. *United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L. Ed. 140 (1896) ("All persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth Amendments). Article 36 adds little to these "legal options," and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections—many of them already enforced by the exclusionary rule—safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.

Finally, suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can

make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance. Of course, diplomatic avenues—the primary means of enforcing the Convention—also remain open.

In sum, neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of Sanchez-Llamas' statements to police.

The Virginia courts denied petitioner Bustillo's Article 36 claim on the ground that he failed to raise it at trial or on direct appeal. The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. See *Massaro* v. *United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003); *Bousley* v. *United States*, 523 U.S. 614, 621, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). There is an exception if a defendant can demonstrate both "cause" for not raising the claim at trial, and "prejudice" from not having done so. *Massaro, supra*, at 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714. Like many States, Virginia applies a similar rule in state postconviction proceedings, and did so here to bar Bustillo's Vienna Convention claim. Normally, in our review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim. *Coleman* v. *Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Bustillo contends, however, that state procedural default rules cannot apply to Article 36 claims. He argues that the Convention requires that Article 36 rights be given "'full effect'" and that Virginia's procedural default rules "prevented any effect (much less 'full effect') from being given to" those rights. Brief for Petitioner in No. 05-51, p. 35.

This is not the first time we have been asked to set aside procedural default rules for a Vienna Convention claim. Respondent Johnson and the United States persuasively argue that this question is controlled by our decision in *Breard* v. *Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) *(per curiam)*. In *Breard*, the petitioner failed to raise an Article 36 claim in state court—at trial or on collateral review—and then sought to have the claim heard in a subsequent federal habeas proceeding. *Id.,* at 375, 118 S. Ct. 1352, 140 L. Ed. 2d 529. He argued that

"the Convention is the 'supreme law of the land' and thus trumps the procedural default doctrine." *Ibid*. We rejected this argument as "plainly incorrect," for two reasons. *Ibid*. First, we observed, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Ibid*. Furthermore, we reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is "no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.,* at 376, 118 S. Ct. 1352, 140 L. Ed. 2d 529. In light of *Breard*'s holding, Bustillo faces an uphill task in arguing that the Convention requires States to set aside their procedural default rules for Article 36 claims.

* * * *

Bustillo . . . argues that since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims. The *LaGrand Case (F. R. G.* v. *U.S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*, and the *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) *(Avena)*, were brought before the ICJ by the governments of Germany and Mexico, respectively, on behalf of several of their nationals facing death sentences in the United States. The foreign governments claimed that their nationals had not been informed of their right to consular notification. They further argued that application of the procedural default rule to their nationals' Vienna Convention claims failed to give "full effect" to the purposes of the Convention, as required by Article 36. The ICJ agreed, explaining that the defendants had procedurally defaulted their claims "because of the failure of the American authorities to comply with their obligation under Article 36." *LaGrand*, *supra*, at 497, P91; see also *Avena, supra*, P113. Application of the procedural default rule in such circumstances, the ICJ reasoned, "prevented [courts] from attaching any legal significance" to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense. *LaGrand*, *supra*, at 497, P91; see also *Avena, supra*, P113.

Bustillo argues that *LaGrand* and *Avena* warrant revisiting the procedural default holding of *Breard*. In a similar vein, several *amici* contend that "the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*." Brief for ICJ Experts 11 (emphases added). We disagree. Although the ICJ's interpretation deserves "respectful consideration," *Breard, supra*, at 375, 118 S. Ct. 1352, 140 L. Ed. 2d 529, we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.

Under our Constitution, "the judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power . . . extends to . . . Treaties." *Id.*, § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. *Ibid.* . . . It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case," Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. *Id.,* at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, *id.,* at 1059 ("Only states [*i.e.,* countries] may be parties in cases before the Court"). While each member of the United Nations has

agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art. 94(1), 59 Stat. 1051, T. S. No. 933 (1945), the Charter's procedure for noncompliance—referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies, Art. 94(2), *ibid.*

In addition, "while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961). Although the United States has agreed to "discharge its international obligations" in having state courts give effect to the decision in *Avena*, it has not taken the view that the ICJ's interpretation of Article 36 is binding on our courts. President Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. to Brief for United States as *Amicus Curiae* in *Medellin* v. *Dretke*, O. T. 2004, No. 04-5928, p. 9a. Moreover, shortly after *Avena*, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes. Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States.

LaGrand and *Avena* are therefore entitled only to the "respectful consideration" due an interpretation of an international agreement by an international court. *Breard*, 523 U.S., at 375, 118 S. Ct. 1352, 140 L. Ed. 2d 529. Even according such consideration, the ICJ's interpretation cannot overcome the plain import of Article 36. As we explained in *Breard*, the procedural rules of domestic law generally govern the implementation of an international treaty. *Ibid.* In addition, Article 36 makes clear that the rights it provides "shall be exercised in conformity with the laws and regulations of the receiving State" provided that "full effect . . . be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), 21 U.S.T., at 101. In the United States, this means that the rule of procedural default—which applies even to claimed violations of our Constitution, see *Engle* v. *Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)—applies also to Vienna Convention claims. Bustillo points to nothing in the

drafting history of Article 36 or in the contemporary practice of other signatories that undermines this conclusion.

The ICJ concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give "full effect" to the purposes of Article 36 because it prevented courts from attaching "legal significance" to the Article 36 violation. *LaGrand*, 2001 I. C. J., at 497-498, PP90-91. This reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. . . .

Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate "the law's important interest in the finality of judgments." *Massaro*, 538 U.S., at 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714. The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny "legal significance"—in the *Avena* and *LaGrand* sense—to otherwise viable legal claims.

Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention. "What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil* v. *Wisconsin*, 501 U.S. 171, 181, n. 2, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.

The ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication.

If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S. T., at 101.

Much as Sanchez-Llamas cannot show that suppression is an appropriate remedy for Article 36 violations under domestic law principles, so too Bustillo cannot show that normally applicable procedural default rules should be suspended in light of the type of right he claims. In this regard, a comparison of Article 36 and a suspect's rights under *Miranda* disposes of Bustillo's claim. Bustillo contends that applying procedural default rules to Article 36 rights denies such rights "full effect" because the violation itself—*i.e.*, the failure to inform defendants of their right to consular notification—prevents them from becoming aware of their Article 36 rights and asserting them at trial. Of course, precisely the same thing is true of rights under *Miranda*. Police are required to advise suspects that they have a right to remain silent and a right to an attorney. See *Miranda*, 384 U.S., at 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694; see also *Dickerson*, 530 U.S., at 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405. If police do not give such warnings, and counsel fails to object, it is equally true that a suspect may not be "aware he even *had* such rights until well after his trial had concluded." Brief for Petitioner in No. 05-51, p. 35. Nevertheless, it is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding. *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

* * * *

We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.

* * *

Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. . . . It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.

* * * *

b. Private right of action for money damages against law enforcement officials responsible for violation

(1) Jogi v. Voges

On September 27, 2005, the U.S. Court of Appeals for the Seventh Circuit found that Tejpaul S. Jogi, an Indian citizen, could enforce the Vienna Convention in U.S. courts by bringing damages claims against law enforcement officials. *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). The panel also held that the Alien Tort Statute, 28 U.S.C. § 1350 (ATS)*, confers jurisdiction on a federal court to entertain an alien's claim for alleged violation of Article 36 of the Vienna Convention.

The United States filed a brief as *amicus curiae* supporting rehearing or rehearing *en banc* on November 10, 2005. *See Digest 2005* at 60-64.

The Seventh Circuit issued an order on September 11, 2006, requesting the parties to submit supplemental memoranda addressing two questions in light of the parties' submissions and the Supreme Court's opinion in *Sanchez-Llamas*, discussed in A.1.a. *supra*:

> 1. What, if anything, does 28 U.S.C. § 1350 add to the analysis of subject matter jurisdiction in this case, in

* 28 U.S.C. § 1350, provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." *See* Chapter 6.I.1.

> light of the Supreme Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that § 1350 is a jurisdictional statute, and in light of the fact that 28 U.S.C. § 1331 authorizes the district courts to exercise subject matter jurisdiction in cases arising under treaties, among other things?
>
> 2. Given the fact that the defendants in the present case are state actors, does 42 U.S.C. § 1983** provide a private right of action to assert a violation of the Vienna Convention? If so, does this make it either unnecessary or undesirable to decide whether the Vienna Convention itself gives rise to an implied private right of action, given the broader implications that attend interpretation of a treaty?

The unpublished order is available at *www.state.gov/s/l/c8183.htm*.

The United States filed its supplemental memorandum on October 5, 2006. As to the first question, the United States argued that, "because subject matter jurisdiction exists under 28 U.S.C. § 1331, there is no need for the Court to determine whether jurisdiction would also rest under 28 U.S.C. § 1350." In any event, the U.S. brief explained:

> . . . We note . . . that there is a serious question whether the treaty violation alleged here, involving an alleged failure of notice by government officials, constitutes a "tort" within the meaning of the Alien Tort Statue, 28 U.S.C. § 1350.
>
> The fact that a court has subject matter jurisdiction under 28 U.S.C. § 1331 over the plaintiff's claim does not

** Editor's note: 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

02-Cummins-Chap02.indd 76 10/22/07 11:27:04 PM

> mean that the court has authority to recognize as a matter of federal common law a private right of action to enforce Article 36 of the Vienna Convention. As the panel decision correctly recognizes, the analysis in *Sosa v. Alvarez-Machain*, 524 U.S. 692 (2004), regarding federal common law's incorporation of customary international law, does not apply to claims brought under 28 U.S.C. § 1350 to vindicate rights under international treaties. . . . Where a plaintiff seeks to vindicate rights assertedly created by a treaty, the appropriate analysis is "analogous to claims under statutes: *if there is an implied private right of action, the claimant can go forward; if not, he must rely on public enforcement measures to vindicate his rights*." Slip op., at 29 (emphasis added).
>
> The same rule applies to claims brought under 28 U.S.C. § 1331. . . .

As to the second question, the United States responded:

> In order to bring a valid claim under 42 U.S.C. § 1983, a plaintiff must show both that federal law creates individual "rights, privileges, or immunities," and also that those rights are "secured by the Constitution and laws" within the meaning of that provision. . . . [N]either requirement is satisfied by a private claim for money damages for an alleged violation of Article 36 of the Vienna Convention.

Further excerpts from the U.S. submission addressing this second question follow (citations to other submissions omitted). The full text of the memorandum is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

A. Article 36 does not create any enforceable individual "rights, privileges, or immunities" that can be vindicated under 42 U.S.C. § 1983. The Supreme Court held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that only "an unambiguously conferred right

[will] support a cause of action brought under § 1983." *Id.* at 283. . . .

Article 36 of the Convention was not intended to establish any enforceable private rights. The United States explained in its initial brief in support of rehearing or rehearing en banc that the text, history, and implementation of the Convention show that it was not intended to create any private rights of enforcement. That same evidence is equally applicable to show that the Convention does not confer private "rights, privileges, or immunities" within the meaning of 42 U.S.C. § 1983.

Thus, the text of the Convention explicitly provides that the privileges and immunities it confers are "*not to benefit individuals*." Vienna Convention, preamble (emphasis added). The drafters of the Convention also drafted an Optional Protocol with carefully tailored and purely voluntary remedies, to be invoked only by States—which is inconsistent with any intent to create freestanding individual rights enforceable under § 1983. *Cf. Abrams*, 544 U.S. at 121-123.

Furthermore, and as we noted in our initial brief . . . , any "rights" that a foreign national might have under the Convention are derivative of, and in aid of, the "rights" of the foreign nation and its consular officials to carry on consular relations. Yet the foreign nation and its consular official cannot sue directly under the Vienna Convention to remedy an alleged violation, nor can they bring an action under 42 U.S.C. § 1983 for damages and injunctive relief. *See Breard v. Greene*, 523 U.S. 371, 378 (1998). It follows that an individual alien should not be able to do so either.

The plaintiff relies heavily on the text of Article 36 providing that rights of consular access "shall be exercised in conformity with [domestic law], subject to the proviso * * * that [domestic law] must enable full effect to be given to the purposes for which the rights * * * are intended." That text, however, does not manifest any intent to create a private remedy or privately enforceable rights. The provision refers to how rights "shall be *exercised*"— *i.e.*, how rights will be implemented in practice in situations where they apply, such as how and when detainees will be notified of the right to contact a consular representative, how consular officers will be informed if the detainee requests ("exercises" his right), and how

consular officers can exercise the right of visitation. The means by which any rights will be "exercised" under the Convention does not speak to the available *remedies* where those rights are violated or not afforded. If a person sues for damages against a police officer who has violated his First Amendment rights, the person is not exercising his First Amendment right when bringing the lawsuit; he is suing for damages to remedy a prior interference with the exercise of his rights.

Notably, the Supreme Court in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), rejected the argument that this provision barred the application of procedural default rules. *Id.* at 2681. The Court also expressed doubt that the Convention requires a "judicial remedy of *some* kind," and noted that "diplomatic avenues" were the "primary means of enforcing the Convention." *Id.* at 2680-2682.[2]

The drafting history of Article 36 of the Vienna Convention also supports the conclusion that it does not create enforceable private rights. The Vienna Convention was drafted by the International Law Commission, the members of which recognized that the proposed article on consular notification "related to the basic function of the consul to protect his nationals vis-a-vis the local authorities," and that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue." International Law Commission, Summary Records of 535th Meeting, U.N. Doc. A/CN.4/SR.535, at 48-49 (1960) (Sir Maurice Fitzgerald). Significantly, the ILC drafters also observed that the consular notification provision would be subject to the

[2] Indeed, even Justice Breyer's dissent in *Sanchez-Llamas*, which concluded that a criminal defendant could invoke the Vienna Convention in "legal proceedings that might have been brought irrespective of the Vienna Convention claim," *i.e.*, "an ordinary criminal appeal and an ordinary post-conviction proceeding," did not decide the question whether the Convention creates "a private right that would allow an individual to bring a lawsuit for enforcement of the Convention or for damages based on its violation." 126 S. Ct. at 2694. Thus, even if the Convention may provide a rule of decision in a case that the alien could have brought in the absence of the Convention, it does not follow that the Convention creates a private right that can itself be the basis for a suit for damages.

02-Cummins-Chap02.indd 79 10/22/07 11:27:05 PM

"normal rule" of enforcement under which a country that "did not carry out a provision" of the Convention would "be estopped from invoking that provision against other participating countries." *Id.* at 49.

The final ILC draft submitted to the United Nations Conference did not require law enforcement officials to notify detained foreign nationals that they could contact a consular representative, but instead required law enforcement officials to notify consular representatives whenever a foreign national was detained. *See* International Law Commission, Draft Articles on Consular Relations, With Commentaries 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Following numerous delegates' expression of concern that requiring mandatory notice would impose a significant burden on receiving States, particularly those with large tourist or immigrant populations, *see* 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 36-38, 82-83, 81-86, 336-340 (1963), the Conference adopted a compromise proposal that required notice to consular representatives at the foreign detainee's request. *Id.* at 82. The purpose of the change was not to enshrine in the Convention an individual right for the detainee, but "to lessen the burden on the authorities of receiving States." *Id.* Given the circumstances in which it was added and the stated purpose for its inclusion, the notification provision cannot reasonably be interpreted to create enforceable private rights.

The history of the Vienna Convention's consideration [for advice and consent to] ratification by the United States Senate and its post-ratification implementation by the Executive Branch provide further evidence that the Convention does not create new private rights within our domestic legal system. The only inference that can be drawn from that history is that the Convention was understood to be "self-executing," *i.e.*, to impose legal obligations on U.S. officials without the need for further implementing legislation. As with federal legislation, the fact the Convention imposes a legal constraint on official conduct does not establish that it creates "rights" within the meaning of 42 U.S.C. § 1983. *See Gonzaga Univ.*, 536 U.S. at 283-284; *see also* consistent with that view, the Restatement (3d) of Foreign Relations Law of United States § 111,

cmt. h (1987) (noting that whether a treaty is "self-executing" is different from whether treaty creates enforceable private rights).

At the time of ratification, the State Department and the Senate Foreign Relations Committee agreed that the Vienna Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department also noted that disputes under the Vienna Convention "would probably be resolved through diplomatic channels" or, "[f]ailing resolution," potentially through the processes set out in the Optional Protocol. *Id.* at 19.[3] And the Executive Branch has long construed Article 36 of the Vienna Convention not to create private rights enforceable in habeas corpus or other actions brought by private individuals and foreign governmental officials. *See, e.g.,* Brief for United States at 11-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51, 04-10566); Brief for United States at 18-30, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928); Brief for United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). The Executive's longstanding interpretation of the Convention not to create private rights "is entitled to great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citation and quotation marks omitted).

Finally, the fact that the rights asserted in this case are based on an international treaty, rather than a federal statute, should make the Court particularly reluctant to construe Article 36 of the Vienna Convention to create private rights enforceable under 42 U.S.C. § 1983. As the United States explained in our initial amicus brief, a treaty is entered into by the Executive and ratified [with the advice and consent of] the Senate against the background understanding

[3] State Department's practice since ratification of the Vienna Convention has been to respond to foreign States' complaints about violations of Article 36's notification requirements by investigating those complaints and, where a violation has occurred, making a formal apology to that country's government and taking steps to lessen the likelihood of a recurrence of the problem. *See* Oct. 15, 1999, Letter from Department of State to Department of Justice in reference to *United States v. Nai Fook Li*, at A-3.

that it will not be privately enforceable. Additionally, international treaties are not the product of bicameral legislation, and private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 937-938 (9th Cir.2003). We are not aware of a single instance in which a federal court of appeals has recognized as valid a claim under 42 U.S.C. § 1983 seeking to enforce an international treaty. Given the absence of clear evidence that Article 36 the Convention was intended to create private rights that would be enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a claim.

B. In addition to failing to create any enforceable private rights, Article 36 of the Vienna Convention is not within the "Constitution and laws" that can secure rights, the deprivation of which are cognizable under 42 U.S.C. § 1983. At best, the textual reference to "laws" is ambiguous about whether it includes international treaties, and the available evidence of Congress' intent as well as general interpretive principles weigh heavily against that construction of the statute.[4]

Section 1983 derives from § 1 of the Ku Klux Klan Act of 1871, establishing and conferring federal jurisdiction over a private right of action to vindicate the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. In 1874, following a multi-year effort to "simplify, organize, and consolidate all federal statutes of a general and permanent nature," Congress enacted the Revised Statutes of 1874. . . . In relevant part, the revised statutes divided the original provision of the 1871 Act into one remedial section and two jurisdictional sections. . . .

[4] As we next explain, the conclusion that the phrase "Constitution and Laws" as used in 42 U.S.C. § 1983 does not include treaties is based on the specific text, history, and context of Section 1 of the Ku Klux Klan Act of 1871, now codified in relevant part at 42 U.S.C. § 1983. This analysis does not imply that the Executive Branch generally construes the term "laws" to exclude treaties. In some contexts, Congress' use of the word can reasonably be interpreted to encompass treaties.

The remedial provision enacted as part of the Revised Statutes in 1874, and now codified at 42 U.S.C. § 1983, created a private right of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws." . . . The Supreme Court has recognized that, notwithstanding statements in the legislative history that the adoption of the revised statutes was not intended to make substantive changes, the inclusion of "and laws" broadened the right of action created by that provision to include claims seeking to vindicate certain individual rights protected by federal statutes. . . .

There is no indication, however, that in enacting the revised statutes *in toto* in 1874 Congress intended to create a new private remedy for treaty violations (which, as we have explained, do not generally afford judicially enforceable private rights). The plain language of the provision—which refers to the vindication of rights protected by "the Constitution and laws," rather than by the "Constitution, the Laws of the United States, and Treaties," U.S. Const., art. III, § 2—does not suggest[] that it was intended to encompass claims arising under international treaties. Nor does the underlying purpose for the provision: Congress' "prime focus" in enacting the Ku Klux Klan Act and other Reconstruction-era civil rights laws was to "ensur[e] a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." *Chapman*, 441 U.S. at 611. The Supreme Court cautioned in *Chapman* that a court should be "hesitant," in interpreting the jurisdictional provisions that were adopted as part of the statutory codification of the Ku Klux Klan Act, to construe them to encompass "new claims which do not clearly fit within the terms of the statute." *Id.* at 612. That concern is particularly acute in the context of recognizing a private right of action to enforce a provision of an international treaty.

Other historical evidence supports the conclusion that the term "laws" in 42 U.S.C.§ 1983 was not intended to refer to an international treaty such as the Vienna Convention. Just one year after enacting the revised statutes incorporating that term, Congress enacted a statute giving circuit courts original jurisdiction in certain categories of cases, including civil claims above the jurisdictional amount and "arising under the Constitution or laws of the

United States, or treaties made." Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The clear implication is that the term "laws" as used in both statutes does not include treaties or international agreements.

* * * *

These historic provisions have been repeatedly amended and recodified in the 130-plus years since their original enactment, yet Congress has chosen not to change the differences in wording among the various statutes. Both the general federal-question statute, 28 U.S.C. § 1331, and the federal habeas statute, 28 U.S.C. § 2241, continue to include the "Constitution," "laws," and "treaties" as among the sources of rights that can be invoked under those provisions. In contrast, 42 U.S.C. § 1983 continues to refer only to rights secured by the "Constitution and laws." This Court should decline to read 42 U.S.C. § 1983 so as to render those textual differences a nullity. . . .[5]

The Supreme Court has not addressed the question whether an international treaty is one of the "laws" that secures rights that can be vindicated under § 1983. However, the Court has rejected an expansive interpretation of the statute, describing the cause of action created as vindicating rights under "the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Consistent with this construction, the Supreme Court has held that § 1983 does not encompass claims arising under common or "general" law, *see Bowman v. Chicago N.W. Ry. Co.*, 115 U.S. 611 (1885), or claims arising out of rights or privileges claimed under state law. *See Baker*, 443 U.S. at 142-144; *Carter v. Greenhow*, 114 U.S. 317 (1885). (fn. omitted).

* * * *

[5] Furthermore, decisions interpreting and applying the federal habeas statute have held that only treaties conferring enforceable individual rights fall within the scope of the statute. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). There certainly would be no basis for reading § 1983 more broadly, to permit a cause of action to enforce a treaty provision that was not intended to create a privately enforceable right.

02-Cummins-Chap02.indd 84 10/22/07 11:27:06 PM

International treaties . . . are adopted with a background presumption that violations will be "the subject of international negotiations and reclamation," not judicial redress. *Head Money Cases*, 112 U.S. 580, 598 (1884). This presumption against individual judicial enforcement protects the prerogatives of the Executive in the conduct of foreign affairs. As the Supreme Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), the potential foreign-policy implications of permitting private rights of action to enforce international law "should make courts particularly wary" of recognizing claims of this sort. *Cf. Gonzaga Univ.*, 536 U.S. at 291 (Breyer, J., concurring) (noting that no "single legal formula" can govern "ultimate question" whether Congress intended for private individuals to have cause of action under § 1983).

It seems particularly implausible that Congress would have intended to include international treaties within the "laws" enforceable in a private damages suit under 42 U.S.C. § 1983, because that would have had the effect of giving foreign nationals greater rights under treaties to which the United States is a party than are conferred upon United States citizens. This Court should be reluctant in the absence of clear Congressional intent "to impose judicially such a drastic remedy, not imposed by any other signatory to this convention," and thus to "promote disharmony in the interpretation of an international agreement." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *see also* Restatement (3d) of Foreign Relations Law of United States § 325, cmt. d (1987).

Finally, even if some treaties could fall within the "laws" that create rights enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a cause of action to enforce Article 36 of the Vienna convention. Where Congress creates a specific statutory remedy for the vindication of a federal right, that is "ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Abrams*, 544 U.S. at 121. A court should be particularly willing to find displacement of a § 1983 remedy in the area of foreign affairs. . . . Here, the existence of explicit government-to-government remedies under the Optional Protocol should bar recognition of a suit under § 1983.

(2) Cornejo v. San Diego

On October 13, 2006, the United States filed a brief as *amicus curiae* in the Ninth Circuit Court of Appeals in support of a district court decision dismissing claims for damages against California law enforcement and other officials based on their alleged violation of Article 36. *Cornejo v. County of San Diego*, No. 05-56202. The U.S. brief, which largely addressed the same issues as *Jogi, supra*, summarized its position in the case as follows:

> . . . [T]he district court correctly dismissed the plaintiff's claims, because the Vienna Convention does not create judicially enforceable individual rights, but was intended to be enforced through the usual means of diplomatic negotiation and political intercession. Even if the Convention did create certain enforceable individual rights, . . . the appropriate mechanism for enforcing those rights would not be a private suit for money damages. Nothing in the Convention creates such an unprecedented remedy, nor has Congress expressed any intent to implement the Convention in this manner. Although the plaintiff invokes 42 U.S.C. § 1983, Article 36 does not create any "rights" within the meaning of that provision, nor is the Vienna Convention encompassed within § 1983's reference to the "Constitution and laws."

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

c. Medellin

José Ernesto Medellin, one of the Mexican nationals covered by the International Court of Justice opinion in *Avena*, was convicted and sentenced to death for capital murder in Texas for a crime committed in 1993. The Texas court had earlier denied Medellin's initial application for writ of habeas corpus, finding that he had failed to object to the violation of his Vienna Convention rights at trial and thus the claims were

procedurally barred. His subsequent attempts to pursue a habeas petition in federal court were equally unsuccessful. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). The Supreme Court initially granted certiorari. 543 U.S. 1032 (2004). *See Digest 2004* at 44-47.

Following a February 28, 2005, Presidential determination that "the United States will discharge its international obligations" under the *Avena* decision "by having State courts give effect to the decision in accordance with general principles of comity" in cases involving any of the Mexican nationals covered by *Avena*, the Supreme Court dismissed as improvidently granted Medellin's petition for writ of certiorari from the Fifth Circuit decision. 544 U.S. 660 (2005). In the meantime, Medellin filed another state habeas action in Texas claiming that the President's memorandum and the *Avena* judgment required the Texas court to grant review and reconsideration of his consular notification claim. At the invitation of the Court of Criminal Appeals of Texas, the United States filed a brief as *amicus curiae* providing its views that the President's determination required the court to "provide review and reconsideration of Medellin's Vienna Convention claim without regard to the doctrine of procedural default or other state law obstacles" and that neither Article 36 nor *Avena* "gives a foreign national a private, judicially enforceable right to attack his conviction or sentence." These developments are discussed in *Digest 2005* at 29-59.

On November 15, 2006, the Court of Criminal Appeals of Texas denied an application for writ of habeas corpus filed by Medellin. *Ex parte Medellin*, 206 S.W. 3d 584 (Tex. Crim. App. 2006). The Texas state court found (1) that the *Avena* decision itself was not binding on it, (2) that the President had exceeded his constitutional authority in issuing the memorandum "by intruding into the independent powers of the judiciary," and (3) that Texas state law limiting the availability of a subsequent habeas petition was neither satisfied in this case nor superseded by either the *Avena* decision or the President's memorandum.

02-Cummins-Chap02.indd 87 10/22/07 11:27:06 PM

At the end of 2006, the time for a petition for a writ of certiorari to the Supreme Court had not yet expired.

2. Consular Assistance

a. Deaths and estates

On October 24, 2006, the Department of State issued a proposed rule with request for comments to update and amend regulations with respect to "deaths and personal estates of United States citizens and non-citizen nationals abroad." 71 Fed. Reg. 62,219 (Oct. 24, 2006). The summary section in the Federal Register explained that "Sections 234 and 235 of the James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 Pub. L. 106-113, 113 Stat. 1501, 22 U.S.C. §§ 2715b and 2715c] made some changes to consular officer and State Department responsibilities with respect to the deaths and personal estates of United States citizens and non-citizen nationals abroad that must be reflected in the regulations."

b. Bilateral treaties

In May 2006 South Africa approached the United States concerning the possibility of a consular agreement between the two countries "regarding the mandatory notification of arrest of South African citizens." Mandatory notification involves notification to the consular post even absent a request to do so from the detained foreign national.

The United States and South Africa are both parties to the VCCR, which imposes an obligation on them to inform a citizen of the other state who has been arrested of his or her right to consular notification and to notify consular posts whenever one of its citizens so requests. Given this already existing framework, the U.S. diplomatic note stated:

> While past concerns about timely notification led the United States and other countries to enter into bilateral

> agreements that provided for mandatory notification, the United States believes that the success of notification upon request under the Vienna Convention depends in part on the establishment of uniform procedures with respect to its obligations under that Convention. Because the Convention explicitly imposes the obligation to notify upon request, the United States believes that additional bilateral agreements on the subject are not necessary.

Note from the Department of State to the Embassy of South Africa, December 20, 2006, available in full at *www.state.gov/s/l/c8183.htm*.

B. CHILDREN

1. Adoption

During 2006 the United States took a number of significant steps toward becoming a party to the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention" or "Convention"), 1870 U.N.T.S. 181, 32 I.L.M. 1134 (1993). Senate advice and consent to ratification and enactment of the Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825, 42 U.S.C. §§ 14901–14954, are discussed in *Digest 2000* at 141-50; *see also* S. Treaty Doc. 105-51 (1998). The United States will ratify the convention only when it has all necessary domestic legal authorities and mechanisms in place to implement its obligations under the Convention, now anticipated for 2007.

a. Accreditation and approval

On February 15, 2006, the Department of State published two final rules, both effective March 17, 2006. The final rule on accreditation of agencies and approval of persons, 71 Fed. Reg. 8064 (Feb. 15, 2006), is a comprehensive and detailed regulation addressing the requirement that adoption service providers be accredited, temporarily accredited, or approved

in order to perform adoption services in connection with a Convention adoption. As explained in the Federal Register: "The Convention gives party countries a choice about whether to rely exclusively on public authorities. . . . If the Convention country chooses to use private bodies, the private bodies must be accredited agencies (nonprofit adoption service providers) or approved persons (for-profit and individual adoption service providers)."

A media note released by the Department of State on February 15 explained:

> . . . Part 96 establishes requirements and procedures for the designation and monitoring of accrediting entities, sets standards that non-profit adoption agencies must be in substantial compliance with to qualify for Convention accreditation and other agencies and individuals must be in substantial compliance with to qualify for Convention approval, and governs the registration of non-profit agencies for temporary accreditation. . . .
>
> * * * *
>
> . . . The United States must have accredited and approved providers available to provide services in Convention cases before depositing its instrument of ratification and bringing the Convention into force for the United States. With the publication of the rule, the Department now may complete its discussions with potential accrediting entities and sign agreements designating qualified public and nonprofit entities to accredit or approve those agencies and persons seeking to provide adoption services in Convention cases.

The media note is available at *www.state.gov/r/pa/prs/ps/2006/61272.htm*; a fact sheet released on the same day is available at *www.state.gov/r/pa/prs/ps/2006/61274.htm*.

Brief excerpts from the Federal Register publication follow. The publication also includes lengthy analyses of comments received and the text of new Part 96. For discussion of the

rule as proposed and published for public comment in 2003, *see Digest 2003* at 108-18.

---

* * * *

The Convention gives party countries a choice about whether to rely exclusively on public authorities or to use private bodies to complete certain Central Authority functions listed in the Convention. If the Convention country chooses to use private bodies, the private bodies must be accredited agencies (nonprofit adoption service providers) or approved persons (for-profit and individual adoption service providers). The Senate's advice and consent to the ratification of the Convention, taken together with the IAA, establish that the United States will use accredited agencies and approved persons (referred to within this preamble as "adoption service providers" where appropriate) to perform certain U.S. Central Authority functions under the Convention. Other Central Authority functions will be performed, as appropriate, by the Department or by other governmental authorities such as the Department of Homeland Security (DHS).

The purpose of this final rule is to establish the regulatory framework for the accreditation and approval function required under the Convention and the IAA. In developing the rule, we conducted an extensive preliminary public input phase, discussed at http://www.hagueregs.org, to garner adoption community input and to engage in a dialogue with stakeholders. On September 15, 2003, the Department published in the Federal Register a proposed rule on the accreditation and approval of agencies and persons (68 FR 54064). For a more detailed discussion of the Convention, the IAA, and the Department's basis for the rule, see the preamble to the proposed rule. The Department held a further meeting on October 28, 2003 to answer questions regarding the proposed rule. The initial 60-day deadline for submitting comments was extended 30 days, to December 15, 2003.

Since issuing the proposed rule, the Department has also initiated a selection process to recruit and identify qualified accrediting entities to accredit agencies and approve persons. (The Department solicited candidates by mailing Requests for Statements of Interest

to the adoption licensing and child welfare services authorities of each State and to all private nonprofit organizations that had expressed interest in providing accreditation/approval services. It also posted the information soliciting statements of interest from qualified candidates on its Web site.) The Department thoroughly reviewed all applications received by the deadline of April 30, 2004. The Department met with qualified candidates in March 2005 to begin negotiating agreements to designate accrediting entities. (70 FR 11306, March 8, 2005). The Department will publish all agreements designating accrediting entities in the Federal Register, as required by the IAA.

Also published in today's Federal Register is the final rule for part 98 of title 22 of the CFR. It provides the rule for the preservation of Convention records by the Department and DHS. Separate rules, which are still under preparation, will establish intercountry adoption procedures under the Convention and the IAA's amendments to the Immigration and Nationality Act (INA).

II. The Department's Implementation of the Convention and the IAA

Consistent with the IAA and the Convention, this rule creates an accreditation/approval system that does not displace State licensing of adoption service providers, but that does create new Federal requirements for agencies and persons handling adoption cases between the United States and other countries party to the Convention. A number of commenters expressed a variety of concerns about the Department's approach to implementing the Convention and the IAA through an accreditation scheme that relies on accrediting entities selected by the Department to oversee and monitor adoption service providers. In response to those concerns, we want to reiterate the guiding principles behind this rule and the Federal accreditation scheme it creates.

* * * *

To implement the new regulation, in July the Department of State published public notices announcing that it had entered into agreements with the Colorado

Department of Human Services (71 Fed. Reg. 38,442 (July 6, 2006)) and the Council on Accreditation ("COA") (71 Fed. Reg. 40,771 (July 18, 2006)) designating them as accrediting entities. Each of the public notices contained the text of the relevant agreement with the Department of State (signed June 29, 2006, with the Colorado Department of Human Services and July 12, 2006, with COA). Excerpts below from the summary and supplementary information sections of the public notice concerning Colorado explain the action taken.

As explained in a media note announcing the designation of COA, "COA will accept applications from adoption service providers licensed and located throughout the United States, while Colorado will limit applications to adoption service providers licensed and operating the State of Colorado." The media note is available at *www.state.gov/r/pa/prs/ps/2006/69503.htm*; a media note announcing the designation of the Colorado Department of Human Resources is available at *www.state.gov/r/pa/prs/ps/2006/68626.htm*.

SUMMARY: The Department of State (the Department) is the lead Federal agency for implementation of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention) and the Intercountry Adoption Act of 2000 (IAA). Among other things, the IAA gives the Secretary of State responsibility for the accreditation of agencies and approval of persons to provide adoption services under the Convention. The IAA requires the Department to enter into agreements with one or more qualified entities under which such entities will perform the tasks of accrediting agencies and approving persons, monitoring compliance of such agencies and persons with applicable requirements, and other related duties set forth in section 202(b) of the IAA. This notice is to inform the public that on June 29, 2006, the Department exercised its authority under the IAA and entered into an agreement with the Colorado

Department of Human Services under which the Department designated the Colorado Department of Human Services as an accrediting entity. In its role as an accrediting entity, the Colorado Department of Human Services will be accrediting or approving qualified adoption service providers located in and licensed by the State of Colorado to enable them to provide adoption services in cases subject to the Convention once the Convention enters into force for the United States. As the U.S. Central Authority for the Convention, the Department will monitor the performance of the Colorado Department of Human Services and approve fees charged by it as an accrediting entity. The text of the Memorandum of Agreement, signed on June 29, 2006 by Maura Harty, Assistant Secretary for Consular Affairs, U.S. Department of State and signed on June 13, 2006 by Marva Livingston Hammons, Executive Director, Department of Human Services, State of Colorado, is included at the end of this Notice. Also included at the end of the Memorandum of Agreement is its Attachment 1, Colorado Revised Statutes Sec. 26-6-104(6.5).

* * * *

SUPPLEMENTARY INFORMATION: . . . Accrediting entities may be (1) nonprofit private entities with expertise in developing and administering standards for entities providing child welfare services; or (2) State adoption licensing bodies that have expertise in developing and administering standards for entities providing child welfare services and that accredit only agencies located in that State. Colorado's Department of Human Services is a State adoption licensing body with expertise in developing and administering standards for entities providing child welfare services and only accredits agencies located in the State of Colorado. . . .

On October 5, 2006, the Department issued a public notice establishing November 17, 2006, as the transitional application deadline. 71 Fed. Reg. 58,893 (Oct. 5, 2006), excerpted below. The action followed Department of State approval of the two accrediting entities' fee schedules and systems for measuring substantial compliance with applicable

standards in evaluating adoption service providers against the standards in Part 96.

---

* * * *

In this public notice, the Department is announcing the transitional application deadline (TAD). In order for an agency or person to be accredited or approved as of the time the Convention enters into force for the United States or for an agency to be temporarily accredited, an agency or person must submit an application and the required fee(s) on or before the TAD to an accrediting entity with jurisdiction to evaluate its application. The Department has designated two accrediting entities. They are: The Council on Accreditation (COA) and Colorado's Department of Human Services. The TAD is November 17, 2006. See 22 CFR part 96.19 for further information on the TAD.

Agencies or persons that do not seek to be accredited or approved by the time the Convention enters into force for the United States may submit an application and the required fee(s) to an accrediting entity with jurisdiction to evaluate its application at any time after the TAD. Agencies seeking temporary accreditation must apply by the TAD.

b. Certifications

On November 2, 2006, the Department of State published a final rule governing (1) certifications and declarations with respect to adoption and custody proceedings taking place in the United States for children emigrating from the United States and (2) certifications with respect to adoptions of children immigrating to the United States where the final adoption occurs in the United States, effective December 4, 2006. 71 Fed. Reg. 64,451 (Nov. 2, 2006). The new rule, 22 CFR Part 97, was issued as a proposed rule with request for comments on June 16, 2006, 71 Fed. Reg. 34,857. Comments received on the proposed rule are discussed in Part II of the November 2

Federal Register publication. Excerpts follow from the November 2006 Federal Register publication.

---

* * * *

Section 303(c) of the IAA gives the Department responsibility for issuing an official certification that a child resident in the United States has been adopted, or a declaration that custody for the purpose of adoption has been granted, in accordance with the Convention and the IAA. The IAA assigns to State courts with jurisdiction over matters of adoption, or custody for purposes of adoption, the responsibility for receiving and verifying documents required under the Convention, making certain determinations required of the country of origin by the Convention, and determining that the placement is in the best interests of the child. With certain limited exceptions, the Convention requires all Convention parties to recognize adoptions, if the adoption is certified by the country of adoption as having been made in accordance with the Convention. This final rule also establishes a separate, discretionary, procedure pursuant to which the Department may certify that an incoming case finalized in the United States (i.e., a case in which custody was granted abroad but the adoption was done by a U.S. court) was done in accordance with the Convention. The Department may issue this certification if an issue arises concerning recognition of the adoption pursuant to Article 23 of the Convention.

c. Preservation of records and reporting

In addition to the accreditation and approval rule issued on February 15, 2006, the Department published a final rule on the same date addressing retention of adoption records for 75 years by federal agencies. 71 Fed. Reg. 8161 (Feb. 15, 2006). The Federal Register publication explained:

> This final rule fulfills the Department's responsibility to promulgate regulations addressing the preservation of Convention records. Section 401(a) of the IAA requires that the Department issue regulations that establish

> procedures and requirements for the preservation of Convention records, implementing in part the Convention's Article 30(1) requirement that each Convention country ensure preservation of information concerning any child whose adoption is subject to the Convention. . . .
>
> * * * *
>
> This rule does not address or change otherwise applicable Federal law governing access to Convention records. Access to Convention records retained by the Department or DHS will be controlled by Federal law governing access to records held by Federal agencies, particularly by the Freedom of Information Act (5 U.S.C. 522 (1966)) and the Privacy Act (5 U.S.C. 552(a)(1974)).
>
> The final rule also does not create a new Federal rule governing access to adoption records—i.e., records held by entities outside the Federal Government. . . .

On September 13, 2006, the Department published a proposed rule with request for comments, "Intercountry Adoption—Reporting on Non-Convention and Convention Adoptions of Emigrating Children," 71 Fed. Reg. 54,001 (Sept. 13, 2006). Excerpts follow from the Supplementary Information in the Federal Register.

---

* * * *

. . . The IAA requires the Department and DHS to establish a Case Registry to track all intercountry adoption cases: Convention and non-Convention; emigrating and immigrating cases. It also requires the Department to report certain information about intercountry adoptions to Congress. To implement these responsibilities, the Department is, with the joint review and approval of DHS, promulgating this proposed rule to require adoption service providers who provide adoption services in intercountry adoption cases involving a child emigrating from the United States (including governmental authorities who provide such adoption services) to report certain information to the Department for incorporation

into the Case Registry. These requirements would apply in both Convention and non-Convention cases involving emigrating children. No regulation is being proposed at this time to establish reporting requirements in cases involving children immigrating to the United States (incoming cases), because sufficient information can be collected through other means, primarily the DHS petition process and the immigration visa and issuance process.

d. Consular officer procedures

On June 22, 2006, the Department of State published a proposed rule with request for comments, "Consular Officer Procedures in Convention Cases." 71 Fed. Reg. 35,847 (June 22, 2006). As described in a media note released by the Department of State on June 26, 2006, the new rule, 22 CFR Part 42

> . . . revises orphan visa processing by consular officers around the world for children being adopted and brought to the United States from a Convention country. U.S. authorities will now perform most of the petition and visa adjudication work earlier in the process in order to confirm a child's eligibility to enter and reside permanently in the United States. This rule will create a new definition of "child" for Convention adoption cases and incorporate Hague requirements into the immigration process by certifying that a child was adopted in accordance with the Convention and the IAA. The comment period is 30 days and closes on July 24, 2006. . . . Separate but complementary regulations relating to the home study and petition process in Convention cases will be issued by the Department of Homeland Security.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/68307.htm*.

2. Abduction

In April 2006 the Department of State submitted to Congress its annual Report on Compliance with The Hague Convention on

the Civil Aspects of International Child Abduction, pursuant to § 2803 of Pub. L. No. 104-277, as amended by § 202 of Pub. L. No. 106-113 and § 212 of Pub. L. No. 107-228. The report covers compliance with the Convention by other state parties for the period October 1, 2004 through September 30, 2005. The Department of State serves as the U.S. Central Authority for the convention.

The report, excerpted below, addresses each of the noncompliant countries and countries of concern to provide the basis of the U.S. views. In keeping with the statute, the report also addresses "efforts by the Department of State to encourage other countries to become signatories to the Convention"; problems of enforcement in foreign countries; and efforts to encourage parties to the Convention "to facilitate the work of non-governmental organizations within their countries that assist parents seeking the return of children under the Convention." Appendix A provides information on each case that remained unresolved more than 18 months after the date of filing, "including specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted."

The full text of the report is available at *www.travel.state.gov/pdf/2006_Hague_Compliance_Report_doc041806.pdf*.

This report identifies specific countries and individual cases in which countries party to the Convention have not complied with its terms, or in which the results for applicant parents in the United States have been inconsistent with the purposes and objectives of the Convention. The Department continues to take steps to promote better sharing of information and more consistent practices among countries party to the Convention. The Department works in close cooperation with the Hague Permanent Bureau on judicial education issues and the formulation of Best Practices guides for states party to the Convention.

Section 2803 (a)(1) of Public Law 105-277, as amended, requires that we report "the number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States ["USCA"] that remain unresolved more than 18 months after the date of filing."

Taking into account the above clarifications, as of September 30, 2005, there were 39 applications for return in USCA records that remained open and active 18 months after the date of filing with the relevant foreign Central Authority. This total includes several cases that became known to the USCA through contacts with parents or local and state officials, but that were actually filed by California authorities directly with a foreign Central Authority.

Section 2803 (a)(2) requests "a list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of the United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States."

The 39 applications identified above that remained unresolved 18 months after the date of filing, as of September 30, 2005, involved 11 countries: Argentina, Australia, Colombia, Ecuador, Greece, Honduras, Israel, Mauritius, Mexico, Poland, and Spain. The extent to which these countries and others appear to present additional, systemic problems of compliance with the Convention is discussed further in the passages concerning Sections 2803 (a)(3), (a)(4) and (a)(6), below.

In considering the question of compliance with the Convention and the treatment of court orders of custody, it should be noted that adjudications of return applications under the Convention are not custody proceedings. Rather, the basic obligation under the Convention to return a child arises if a child is removed to or retained in a country party to the Convention in violation of rights of custody existing and actually exercised in (and under the law of) the child's country of habitual residence. . . .

Section 2803 (a)(3) requests "a list of countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to the applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States."

* * * *

The Department used analysis of the following four elements to reach its findings on compliance: 1) the existence and effectiveness of implementing legislation; 2) Central Authority performance; 3) judicial performance; and 4) enforcement of court orders. Analysis of "implementing legislation" examines whether, after ratification of the Convention, the Convention is given the force of law within the domestic legal system of the country concerned, enabling the executive and judicial branches to carry out the country's Convention responsibilities. "Central Authority performance" involves the speed of processing applications; the existence of and adherence to procedures for assisting left-behind parents in obtaining knowledgeable, affordable legal assistance; the availability of judicial education or resource programs; responsiveness to inquiries by the USCA and left-behind parents; and success in promptly locating abducted children. "Judicial performance" comprises the timeliness of a first hearing and subsequent appeals of petitions under the Convention and whether courts apply the law of the Convention appropriately. "Enforcement of court orders" involves the prompt enforcement of civil court or other relevant orders issued pursuant to applications under the Convention by administrative or law enforcement authorities and the existence and effectiveness of mechanisms to compel compliance with such orders. Countries in which failure to enforce orders is a particular problem are addressed in the passages concerning Section (a)(6) below.

This report identifies those countries that the Department of State has found to have demonstrated a pattern of noncompliance, or that, despite a small number of cases, have such systemic problems that the Department believes a larger volume of cases would demonstrate a pattern of noncompliance. In addition, the Department recognizes that countries may demonstrate varying levels of commitment to and effort in meeting their obligations under the Convention. The Department considers that countries listed as noncompliant are not taking effective steps to address serious deficiencies.

Applying the criteria identified above, and as discussed further below, the Department of State considers Austria, Ecuador, Honduras, Mauritius, and Venezuela to be "Noncompliant" and Brazil, Chile,

Colombia, Greece, Mexico, Panama, and Turkey to be "Not Fully Compliant" with their obligations under the Convention. The Department of State has also identified several "Countries of Concern" that have inadequately addressed significant aspects of their obligations under the Convention. These "Countries of Concern" are Hungary, Poland, Romania, Spain, and The Bahamas.

NOTE REGARDING COMPARISONS TO THE 2005 REPORT

In several countries during this reporting period, the USCA saw either improvements or increasing problems with Convention implementation that has led to a change in the Department's findings in this report, as compared to last year's report.

Colombia has passed Convention implementing legislation and the Colombian Central Authority has continued to exhibit greater cooperation with the USCA than in past reporting periods. Consequently, Colombia has been upgraded from "noncompliant" to "not fully compliant." Panama also showed a higher degree of cooperation on Convention cases and improvement in Convention education initiatives. For the reporting period, Panama is likewise rated as "not fully compliant," as is Turkey, a result of demonstrated improvement in judicial case processing.

Switzerland, rated a "country of concern" in the last report, is now seen as compliant, although enforcement problems persist. France exhibited improved enforcement performance and is no longer cited.

Due to slow processing and adjudication of cases, Spain has been added to the list of countries we have identified with compliance problems for the first time, as a "country of concern." Brazil and Venezuela are also mentioned in the report for the first time. Brazil's performance is rated as "not fully compliant" due to delays in processing and adjudication of Convention cases as well as a general lack of responsiveness by the Brazilian Central Authority. Venezuela's performance is rated as "noncompliant" due to lack of responsiveness by the Venezuelan Central Authority, severe delays in case processing and adjudications, and a lack of judicial training.

* * * *

3. Parental Access

On May 15, 2006, the United States and Jordan signed the Memorandum of Understanding on Consular Cooperation in Cases Concerning Parental Access to Children, recording the two countries' intent to seek an arrangement to enhance cooperation. The "Scope, Purpose, and Basis" section of the MOU is excerpted below; the full text is available at *www.state.gov/s/l/c8183.htm*.

The Hashemite Kingdom of Jordan and the United States of America intend to seek an arrangement to enhance consular and other cooperation toward resolving and managing the difficulties involving parents residing in one country whose children reside in the other country. The Hashemite Kingdom of Jordan and the United States of America are committed to working together to encourage the maintenance of the bond between parents and their children.

The purpose of such an arrangement would be to assist a parent residing in one country to obtain meaningful access to his or her children residing in the other country. Such access could be sought in conjunction with a parent's efforts to obtain the return of a child to his or her habitual residence, or as the parent's primary goal in the context of shared custody or a custody dispute.

The basis for such an arrangement would be the Vienna Convention on Consular Relations, Articles 5(e) and (h), according to which consular functions include assisting nationals of the sending state and safeguarding the interests of children who are nationals of the sending state.

Nothing in such an arrangement would undermine the purpose to return children to their habitual residence, nor would such an arrangement or any of its terms prevent parents from attempting simultaneously to establish or enforce rights of custody and access through the legal systems of either country according to its applicable laws. Access by parents to their children is not a substitute for the return of children to their habitual residence.

* * * *

C. PRISONER ISSUES

In October 2006 the United States had occasion to reiterate its longstanding view of prisoner transfer agreements with foreign governments, as set forth below.

The United States has a strong preference for accession to a multilateral treaty. Although we have bilateral prisoner transfer treaties with twelve countries, most dating from the late 1970s/early 1980s, in recent years the United States has recommended that countries seeking to enter into a prisoner transfer mechanism with us consider acceding to the Council of Europe Multilateral Convention on the Transfer of Sentenced Persons (the "COE Convention" or "Strasbourg Treaty"), or the Inter-American Convention on Serving Criminal Sentences Abroad (the "Inter-American Convention" or "OAS Convention"). The United States is a party to both treaties. 60 other countries are party to the COE Convention. The Inter-American Convention is in force in 12 countries. For a country in the Western Hemisphere, accession to the OAS Convention would be the fastest and easiest way to begin prisoner transfer with the United States at the earliest possible date.

The USG view in support of a multilateral regime is based on our assessment that the COE Convention and Inter-American Convention offer substantially all the mutual benefits that could be expected from a bilateral treaty, and facilitates the development of a single, unified legal regime. Bilateral agreements create the possibility of multiple legal regimes. In addition, negotiating, concluding and obtaining Senate consent to ratifying bilateral treaties has proven to be a long, uncertain, and human and financial resource-intensive process. For all of these reasons, since the early 1980s, the United States has consistently declined to enter into bilateral negotiations with the many countries that have expressed interest in bilateral prisoner transfer treaties. The multilateral convention offers an attractive and practical solution, and would provide the most effective and efficient manner in which to implement a future prisoner transfer mechanism between the United States and a foreign government. The USG does not "sponsor" nations wishing to accede to either the COE Convention

or the Inter-American Convention. Nevertheless, we generally support the accession of new member states.

D. JUDICIAL ASSISTANCE

1. Apostille

On March 3, 2006, Monica A. Gaw, Acting Director, Office of Policy Review and Inter-Agency Liaison, Overseas Citizens Services, Bureau of Consular Affairs, Department of State, responded to an inquiry from a state official, concerning the "proper language to be used in an apostille certificate issued by a designated authority in the United States pursuant to the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents."

The letter, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*.

I understand your office received a request to issue apostilles in the Spanish language for use by the bearers in Mexico.

The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Apostille Convention) is a multilateral treaty, the main purpose of which is to facilitate the circulation of public documents issued by a State Party to the Convention and to be produced in another State Party to the Convention. See the Outline of the Convention prepared by the Hague Conference on Private International Law available at http://hcch.e-vision.n.1/upload/outline12e.pdf.

Article 4 of the treaty provides that the certificate may "be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language." For a model of the apostille certificate, see http://hcch.e-vision.n1/upload/apostille.pdf.

In 2003 the Hague Conference on Private International Law convened a Special Commission on the Practical Operation of the Apostille Convention. The Conclusions and Recommendations

of the 2003 Special Commission on the Practical Operation of the Hague Apostille Convention, available at http://hcch.e-vision.n1/upload/wop/lse_concl_e.pdf, provided in paragraph 19[:] "the Special Commission concluded that Article 4 of the Convention permitted the use of more than one language in the apostille and that this might well assist in the circulation of documents." This practice is not uncommon in jurisdictions with more than one official language, such as Switzerland.

When the United States of America acceded to the Hague Apostille Convention, it designated multiple authorities to issue apostille certificates. This designation is available at http://hcch.e-vision.n1/indexen.php?act=authorities.details&aid=353. The United States has three tiers of authorities competent to issue the apostille certificate. The U.S. Department of State Authentications Office affixes apostilles to documents issued by Federal agencies of the United States. The Clerks and Deputy Clerks of the Federal Courts of the United States issue apostilles on documents issued by those courts. Public documents issued in U.S. states, the District of Columbia and other U.S. jurisdictions may be legalized with an apostille by designated authorities in each jurisdiction, generally the state Secretary of State's office.

The United States issues apostilles in the English language with the title of the certificate in French, consistent with Article 4. The U.S. Department of State may authenticate a foreign language document if it is accompanied by a certified English translation. The Hague Apostille Convention is in force in more than 87 countries each speaking a wide variety of languages. It is not possible for the United States Department of State to issue apostille certificates in the language of the country where the document is intended to be used. Persons in the United States seeking to present apostilled Foreign Public Documents, as that term is used in the treaty, in other countries generally have the documents translated into the language of the country in question.

You advised that your inquirer expressed the view that the U.S. practice not to issue apostille certificates in Spanish constitutes some form of discrimination against persons who intend to present documents in Mexico. In fact, the United States does not issue apostille certificates in any language other than English, except for the

title of the certificate, which is in French as mandated by Article 4 of the treaty.

* * * *

U.S. state authorities that issue apostilles do so under a delegation from the U.S. Department of State. We have raised your question as to whether New Mexico should comply with the request and issue apostilles in the Spanish language with the Office of the Legal Adviser of the U.S. Department of State. We conclude that the U.S. Department of State offices which issue apostilles would not comply with such a request, and that we would not advise the clerks and deputy clerks of the Federal Courts or the designated officials of the several states, the District of Columbia or other jurisdictions to do so.

2. Russia: Letters Rogatory

On November 3, 2006, Edward A. Betancourt, Director of the Office of Policy Review and Inter-Agency Liaison in the Directorate of Overseas Citizens Services ("OCS"), Bureau of Consular Affairs, U.S. Department of State, submitted a declaration to the U.S. District Court of the Northern District of Illinois in *United States of America v. Stratievsky*, 430 F. Supp. 2d 819 (N.D. Ill. 2006). Excerpts from the declaration below describe the relationship between the United States and the Russian Federation on judicial assistance and the fact that "[t]o the best of our knowledge, no request for testimony pursuant to letters rogatory on behalf of the defense in a criminal case, or in a civil case, has been successfully executed in Russia in recent years."

The full text of the declaration, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

3. Judicial assistance between the United States and the Russian Federation is governed by multilateral conventions to which the

United States and Russia are parties; the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 UST 361; and the Vienna Convention on Consular Relations ("VCCR"), 21 U.S.T. 77, as well as, customary international law; and applicable U.S. and local Russian law and regulations. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555, is not in force between the United States and the Russian Federation. Although the Russian Federation acceded to the Hague Evidence Convention April 30, 2001, no Russian Central Authority has been established, and accordingly, the United States has not accepted Russia's accession.

4. Moreover, there are two bilateral agreements in force between the United States and the Russian Federation pertaining to judicial assistance. The Treaty on Mutual Legal Assistance in Criminal Matters, with related note, signed at Moscow June 17, 1999 entered into force January 31, 2001. Assistance under this agreement is available only to the prosecution. The other bilateral instrument is the Exchange of Notes Between the United States of America and the Union of Soviet Socialist Republics of November 22, 1935 on the Execution of Letters Rogatory, 49 Stat. 3840, and the supplementary letter of January 19, 1937 from the Vice Director of the Legal Division of the People's Commissariat for Foreign Affairs to the American Charge d'Affaires ad interim, 11 Bevan 1262-1267, publication 843, Executive Agreement Series No. 83.

5. The U.S. Department of State expects criminal defendants who wish to request judicial assistance in obtaining evidence or in effecting service of documents abroad in connection with criminal matters to make such requests pursuant to letters rogatory in accordance with Article 5(j) of the Vienna Convention on Consular Relations.

6. Russian authorities do *not* recognize the authority or ability of foreign persons, such as American attorneys, to take voluntary depositions of willing witnesses, even before a U.S. consular officer. In bilateral meetings held in Moscow in 2003 and 2004, Russian authorities reiterated this position and confirmed that this applies to both civil matters and defense requests in criminal matters. There have been no bilateral meetings to discuss this matter since 2004.

7. In view of this position, Russia has advised it would deem taking depositions in Russia before a U.S. consular officer as a violation of Russia's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorney. A private U.S. defense attorney in a criminal case seeking assistance from Russia, or any foreign country, customarily submits a letter rogatory through the Department of State Directorate for Overseas Citizens Services, which then forwards the request through the diplomatic channel to the appropriate Russian authorities, 22 C F R 92.66, 7 Foreign Affairs Manual 931. This procedure is explained in the "Preparation of Letters Rogatory" feature on the Department of State, Bureau of Consular Affairs Internet webpage.

8. While Russia has insisted on exclusive use of letters rogatory, this vehicle has proven in practice to be unreliable. To the best of our knowledge, no request for testimony pursuant to letters rogatory on behalf of the defense in a criminal case, or in a civil case has been successfully executed in Russia in recent years.

9. In July 2003, Russia unilaterally suspended all judicial cooperation with the United States in civil and commercial matters. Russia refuses to serve letters of request from the United States for service of process presented under the terms of the 1965 Hague Convention or to execute letters rogatory transmitted via the diplomatic channel. Russia also declines to give consideration to U.S. requests to obtain evidence. The suspension relates to a fee imposed by the United States for service of documents under the Hague Service Convention.

10. The Department and the Russian Foreign Ministry have exchanged several diplomatic notes setting out our respective positions on the matter, and met twice in Moscow in 2003 and 2004 to explore ways to provide normal judicial cooperation.

11. While the Department of State is prepared to transmit letters rogatory for service or evidence to Russian authorities via the diplomatic channel, in our expedience, all such requests are returned unexecuted. Likewise requests sent directly by litigants to the Russian Central Authority under the Hague Service Convention are returned unexecuted.

12. The Department of State, Bureau of Consular Affairs, Directorate of Overseas Citizens Services has not received letters rogatory for transmittal to the appropriate judicial authorities of

the Russian Federation via the diplomatic channel in the matter of United States of America v. Boris Stratievsky, et al. If such letters rogatory are received, the Department of State will process them as expeditiously as possible in accordance with Department of State regulations (e.g. 22 CFR §§ 22.1, 92.55; 7 Foreign Affairs Manual 931). The United States notes as stated above that in July 2003, Russia unilaterally suspended all judicial cooperation with the United States in civil and commercial matters.

* * * *

Cross References

International enforcement of child support obligations, **Chapter 15.B.**
Judicial assistance in gathering evidence abroad, **Chapter 15.C.3.**

Chapter 3

International Criminal Law

A. EXTRADITION, MUTUAL LEGAL ASSISTANCE AND RELATED ISSUES

1. Treaties

a. Extradition treaties

(1) U.S.-UK extradition treaty

(i) Hearing before Senate Foreign Relations Committee

On July 21, 2006, the Senate Foreign Relations Committee ("SFRC") held hearings on the U.S.-UK extradition treaty. Paul J. McNulty, Deputy Attorney General, Department of Justice, and Samuel M. Witten, Deputy Legal Adviser, Department of State, testified in support of advice and consent to ratification of the treaty. Other witnesses at the hearing included Jack Meehan, president of the Ancient Order of Hibernians, Dr. Robert Linnon, president of the Irish American Unity Conference, and Professor Madeline Morris of Duke University Law School. Mr. Meehan and Dr. Linnon spoke to concerns with the treaty, including what Mr. Witten described as an unwarranted concern that the treaty "is somehow specifically targeted to the Irish-American community". The treaty was one of four law enforcement treaties previously considered by the SFRC on November 15, 2005. *See Digest 2005* at 69-71, 73-74, and 75-77.

03-Cummins-Chap03.indd 111 10/22/07 11:33:46 PM

Excerpts from Mr. Witten's prepared statement follow. The full text is available in *U.S.-U.K. Extradition Treaty: Hearing Before the S. Comm. On Foreign Relations*, 109th Cong. 41-47 (2006).

. . . I will take the opportunity today to bring to the Committee's attention developments that make entry into force of this key law enforcement treaty a matter of even greater urgency than when I testified in favor of Senate approval on November 15, 2005.

* * * *

In 2003, the UK adopted domestic legislation simplifying its extradition practice, and in a show of good faith in anticipation of this new treaty coming into force, it applied the benefits of the new law to the United States. . . .

Our delay in ratification has become a major political issue in the UK. . . .

Under the changes to UK domestic law brought about by the 2003 UK Extradition Act, the U.S. received preferential designation in the British system as a "part 2 country." The most significant result of this favorable designation is that, when seeking the extradition of a fugitive, we benefit from an evidentiary standard that is analogous to the U.S. probable cause standard that is imposed on the United Kingdom for requests to the United States. The United States also can use hearsay evidence in British courts. This change greatly facilitates the presentation of extradition requests from the United States to the UK, and enhances our ability to obtain fugitives wanted for trial in the United States on a range of serious offenses.

Recently, however, the UK executive branch has been facing increasing pressure from those who complain of a lack of "reciprocity" in the U.S.-UK extradition relationship because the U.S. Senate still has not approved this treaty and the Executive Branch has therefore not been able to bring it into force. As a result of this criticism, amendments have been proposed to the UK Extradition Act that would remove the preferential treatment currently afforded the United States in advance of the treaty's entry into force, and the good faith of the United States has been called into question by members of the British Parliament. . . . A binding vote on the proposed amendments may take place later this year, and could

undermine major interests of the United States and erode our credibility further in the United Kingdom. . . .

In addition to these potential adverse changes in UK law and ongoing criticism of the United States that result from our delay in bringing the treaty into force, the U.S. of course cannot benefit from provisions of the new treaty not otherwise addressed in UK law that, once in force, would meaningfully advance some of our most important law enforcement efforts. For example, the new treaty has, like most modern extradition treaties, a provision allowing for the temporary surrender for prosecution in the Requesting State of a fugitive who is already being proceeded against or serving a sentence in the Requested State. There is no such provision in the treaty currently in force. Temporary surrender would be critical to many of our terrorism-related prosecutions and would allow us to try expeditiously fugitives such as Abu Hamza, who is currently serving a prison sentence in the UK but is wanted to stand trial in the U.S. on a range of charges, including providing material support to terrorist organizations and attempting to set up a terrorist training camp in the U.S. . . .

* * * *

After the hearing before this Committee in November 2005, the Committee submitted certain questions for the record to me and to the Department of Justice witness, Mary Ellen Warlow.* We were pleased to provide answers to all of those important questions and, in doing so, address particular concerns of the Committee in relation to the treaty. For example, we explained the reasons for modifying the exceptions to the political offense clause under the new treaty.

We also explained why the new treaty does not include Article 3 of the 1985 supplementary treaty, which allowed fugitives to avoid extradition if they could establish before a U.S. court that the request for extradition was politically motivated. We explained that, in U.S. law and practice, questions of political motivation are determined by the Secretary of State, in recognition of the principle that the Executive Branch is best equipped to evaluate the motivation of a foreign government in seeking an individual's extradition.

* Editor's note: For responses to questions submitted following the 2005 hearing, *see Digest 2005* at 75-77 and (ii) below.

Article 3 of the supplementary treaty, which undermined this long-standing Rule of Non-Inquiry, led to long, difficult, and inconclusive litigation in several cases where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing the motivation of a foreign government, as well as claims of generalized bias within a foreign system of justice. We explained in detail the circumstances of each of those cases, and noted that none remained pending at this time. Our experience with Article 3 of the supplementary treaty confirmed the need to exclude this anomalous provision from our bilateral extradition treaties.

We also explained provisions in the treaty relating to extraterritorial jurisdiction, provisional arrest, probable cause, and the search and seizure of items. We further explained the circumstances making it appropriate to include in the treaty the possibility of waiver of the rule of specialty. As we explained in detail in our responses to the Committee's questions, all of these changes were meant to modernize and strengthen the ability of the United States to seek and grant the extradition of fugitives wanted for serious crimes, all within the framework of well-established U.S. law and procedure.

Finally, I note that in addition to the matters addressed in our questions for the record, there have been some unfounded claims that this new treaty with the United Kingdom is somehow specifically targeted to the Irish-American community. These arguments are simply not accurate. There is nothing in this treaty that justifies these misinterpretations that have been thrust upon it by these critics. To the contrary, this treaty is no different in its scope of application than any of our other modern treaties, and it is entirely consistent with U.S. obligations under relevant law. It applies to a full range of criminal conduct and crimes, does not target any particular group, and contains all of the protections that are expected under U.S. law and practice. The treaty modernizes one of our most important law enforcement relationships, is critical to the continued efforts of the United States in the global war on terrorism, and should be ratified forthwith.

(ii) Questions for the record

On March 10, 2006, the Department of State and Department of Justice submitted responses to additional questions from

Senators arising from the November 2005 hearing. Excerpts below address questions from Senators Richard G. Lugar and Joseph R. Biden concerning differences between the list of violent crimes excluded from consideration as political offenses in the 1985 Supplementary Treaty and those to be excluded under Article 4(2) of the new treaty. The full texts of all questions and answers related to the 2005 hearing are available at *www.state.gov/s/l/c8183.htm; see also Digest 2005* at 75-77 relating to a question and answer submitted in 2005 on the treatment of allegations of political motivation under the new treaty.

* * * *

As in other extradition treaties, the new treaty provides that certain types of offenses will not be considered to be political offenses for the purpose of evaluating a request for extradition. Many of these provisions, including (a), (c), (d), (e), and (g), are similar to provisions contained in the existing treaty.

The addition of section (b) ("a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family") has become a routine provision under the political offense exception, in recognition of the inherent seriousness of attacks against heads of state.

The addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage"), which is not contained in any other extradition treaty of the United States, is designed to address the problem of an extremely narrow U.S. judicial interpretation of the more general language of the current UK supplementary treaty regarding explosives offenses. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23-pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison, and was subsequently arrested in the United States. (*Matter of Artt*, 972 F.Supp. 1253, 1260-1262

(N.D.Cal. 1997).) In the course of the U.S. extradition case against Brennan, the Court of Appeals for the Ninth Circuit held that this offense did not constitute an "offense involving the use of a bomb" excluded from consideration as a protected political offense under Article l(d) of the Supplementary Treaty. *Matter of Artt*, 158 F.3d 462,471-473 (9th Cir. 1998). The language of the new treaty makes it clear that such an explosives offense, like other serious crimes of violence, is not to be considered a "political" offense for which extradition is barred.

The use of "manslaughter" in section (c) of the new treaty, as opposed to "voluntary manslaughter" in the 1985 Supplementary Treaty, is consistent with the language used in other recent U.S. extradition treaties, including Canada, Hungary, Luxembourg, and Poland. The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," reflects the language used in other extradition treaties, including those with Canada, France, and Hungary. The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty—it is used in Article l(d) of the 1985 Supplementary [T]reaty. This same language is also used in other of our modem U.S. extradition treaties, including those with France, Hungary, and Poland.

The changes to the wording in section (e) ("placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, causing grievous bodily harm, or of causing substantial property damage") derive from our decision to have this language track the analogous international commitment in the United Nations International Convention for the Suppression of Terrorist Bombings, an international law enforcement cooperation agreement to which both the United States and the United Kingdom are parties. Section (e) also includes unlawful use of firearms, which, of course, was beyond the scope of the U.N. Convention and, in this respect, is similar to the analogous provision in Article l(d) of the existing treaty.

The changes to the wording in section (g) ("an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses") closely reflect the wording of U.S. criminal law on principals

and aiding and abetting, which states, in part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. 2.

* * * *

b. The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," as in the 1985 Supplementary Treaty, reflects the language used in other of our modern extradition treaties, including those with Canada, France, and Hungary.

c. The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty - it is used in Article l(d) of the 1985 Supplementary treaty. This same language is also used in other of our modem extradition treaties, including those with France, Hungary, and Poland.

Mr. Witten and Mr. McNulty provided written responses to questions for the record following the July 2006 hearing from Senators Lugar, Biden and Christopher J. Dodd. A few of the exchanges are excerpted below; the full text of all questions and answers is available at *www.state.gov/s/l/c8183.htm*.

A question from Senator Lugar asked how the treaty ensures that the United States would not extradite individuals to the United Kingdom for political speech given critics' assertions that it would allow extradition of persons for publicly speaking in opposition to British policy in Northern Ireland.

Answer:

Several provisions in the treaty would preclude extradition where the conduct for which extradition is sought constitutes political speech.

First, Article 2 of the treaty contains a standard "dual criminality" clause, which provides that offenses are extraditable only if the conduct on which they are based is punishable in both States by imprisonment for a period of at least one year. In the United States, conduct protected as political speech by the First Amendment to the

U.S. Constitution cannot be criminalized, and, as a result, there would be no dual criminality and the United States could not extradite someone to the United Kingdom on the basis of such conduct.

Second, political speech would also be protected as a political offense under Article 4 of the treaty. Extradition could not be granted if the conduct for which extradition was sought consisted of non-violent political speech. Under both the current and the proposed extradition treaty, U.S. federal courts are responsible for enforcing this mandatory bar to extradition.

Finally, even if the dual criminality standard were met, and the conduct for which extradition was sought did not constitute a political offense under the treaty, the Secretary of State would have the ability to refuse to surrender the individual if she determined that a particular request for extradition is politically motivated. Although the Supplementary Treaty of 1985 provided that courts would make this determination in some cases, Article 3(b) of that Treaty specified that judicial review could be invoked only in cases involving certain violent offenses, such as murder, kidnapping, and offenses involving the use of a bomb. Thus, any assertion of political motivation with respect to an offense involving political speech, which by definition is a non-violent activity, would be determined by the Secretary of State under the proposed treaty in the same manner as it would be under the current 1972 Treaty and 1985 Supplementary Treaty.

* * * *

Another question from Senator Lugar asked for an explanation of the role of the judiciary in determining whether individuals may be extradited from the United States under the treaty.

Answer:

The treaty will not alter longstanding U.S. law, including the provisions of Title 18, Chapter 209 of the U.S. Code relating to extradition (18 U.S.C. §§ 3181 et seq.), which provide for judicial determinations at successive steps in the extradition process:

Arrest: A judge must determine whether there is a sufficient basis to issue a warrant for the arrest of the person sought for extradition.

Bail: The person sought may apply to the court for release pending the extradition hearing. It is for the judge to determine whether release is appropriate under U.S. law and the circumstances of the case, and if so what conditions of release may be appropriate.

The extradition hearing: The extradition hearing is before a judge, who must, in order to find the person extraditable, determine that there is probable cause to believe the crime for which extradition is sought has been committed and that the person sought committed that crime; that the offense is one for which extradition is provided under the treaty; that the conduct charged would also constitute an offense in the United States (dual criminality); and that, if raised by the fugitive, there is no defense to extradition under the applicable treaty. If the judge so finds, then he or she "certifies" that the person is extraditable. While the final decision to surrender a fugitive rests with the Secretary of State, such a judicial certification of extraditability is required before the Secretary may act to surrender the fugitive.

Review of the finding of extraditability: If the person sought has been found extraditable by the judge at the extradition hearing, he or she may seek judicial review of that decision in the District Court through habeas corpus proceedings. If the District Court denies the habeas petition, then the person sought may seek further judicial review by appealing the decision of the District Court.

> Senators Lugar and Dodd asked for clarification concerning treatment of crimes for which there is extraterritorial jurisdiction.

Answer:

The proposed treaty permits a two-pronged approach with respect to offenses that are applied extraterritorially. As with all offenses, there must first be a finding of dual criminality. Thus, for example, in the case of an offense involving kidnapping, the requirement of dual criminality would be fulfilled since the law of both the United States and the United Kingdom punish kidnapping as a serious criminal offense. If, however, the kidnapping has occurred outside the territory of the Requesting State, then there can be a further

inquiry as to whether the Requested State would be able to exercise extraterritorial jurisdiction in similar circumstances. The United States and the United Kingdom approach this issue differently and the language of Article 2, paragraph 4, is specifically intended to accommodate the different approaches.

Where the United Kingdom is the Requested State, i.e., the State considering an extradition request from the United States, current UK extradition law requires, with respect to extraterritorial offenses, that in addition to a finding of dual criminality there also be a finding that UK law would permit an exercise of extraterritorial jurisdiction in similar circumstances. In our experience, the United Kingdom is among the limited number of countries that require this additional finding with respect to extraterritorial jurisdiction. (Another is Israel, and a similar provision regarding extraterritorial jurisdiction is set out in the 1962 U.S.-Israel extradition treaty; this provision is unchanged by the Protocol to that treaty that was recently approved by the Foreign Relations Committee.)

The majority of countries, including the United States, do not require such a finding of duality of jurisdiction with respect to extraterritorial offenses. Thus, for the United States, if the United Kingdom were to seek extradition for an offense committed outside its territory for which the United States would not be able to exercise extraterritorial jurisdiction, the United States would have the discretion to deny extradition, but it would not be required to do so. We note, however, that as a general matter, the current approach of U.S. and UK criminal law to extraterritorial jurisdiction is similar and remains relatively more restrictive than that of countries with a civil law tradition.

Senator Biden asked whether the Department of Justice views the Fourth Amendment to the U.S. Constitution as applying to the provisional arrest provisions of the current and of the new treaty.

Answer:

The Department of Justice has taken the position that the Fourth Amendment does apply in the context of the issuance of a warrant

for provisional arrest pending extradition. That principle, applicable to requests under the current treaty with the United Kingdom, would continue to apply under the language of the new treaty.

The Department of Justice does not anticipate any substantive change in the type or quantum of evidence that we submit to our courts in support of a request for issuance of a provisional arrest warrant.

Senator Dodd asked for further information concerning U.S. practice related to waiver of the rule of specialty.

Answer:

Since our responses to the Committee's questions for the record after the November 2005 hearing, the United States has received 5 requests for waiver of the rule of specialty. Thus, from 1991 to the present, the Department of State has received 35 requests for waiver, and, of these, 17 were granted, 5 were denied, and 13 are pending.

When the State Department receives a request for a waiver of the rule of specialty, it will take into consideration the following factors in determining whether to grant the waiver: whether the failure to include an offense in the original extradition request is justified because it was not previously possible to do so for legal or practical reasons, and whether there is sufficient evidence to meet the probable cause standard regarding the offense for which the request is made. Our experience is that in some cases the request for waiver relates to the same offense or act, and in other cases the request may apply to a new offense or act. In either event, the factors identified above would be taken into account.

As an example of the kinds of cases in which waivers are sought, we have granted a request from Germany for waiver of the rule of specialty in a case where an individual was extradited for robbery. Based on testimony provided in the subsequent trial, which revealed that the defendant may have been involved in two additional, separate robberies, Germany requested that the United States waive the rule of specialty so that the defendant could be prosecuted for those additional crimes. Because the German

authorities did not know of the two additional robberies until after the defendant was extradited, and because we were satisfied that probable cause existed, we consented to waiver of the rule of specialty.

(iii) *SFRC report to the Senate and Senate advice and consent to ratification*

On September 20, 2006, the SFRC reported the treaty to the Senate recommending that the Senate give advice and consent to ratification. Senate Exec. Rept. 109-19. Letters between UK and U.S. government officials relating to concerns raised as to the treaty's applicability to "the extradition of individuals convicted of terrorist offences prior to" the April 10, 1998, Belfast or Good Friday Agreement are set forth in an appendix to the report. Several of the letters are referenced in proviso 1(B)(ii) and (iii) in the recommended resolution of advice and consent to ratification included in the report, which were subsequently adopted by the Senate; see below. One of the letters, from UK Secretary of State for Northern Ireland Peter Hain to U.S. Attorney General Alberto Gonzales, dated September 4, 2006, is set forth below in full.

Dear Attorney General: I am writing to reiterate the UK Government's position relating to the extradition of individuals from the United States in relation to terrorist offences committed during the Troubles in Northern Ireland.

In September 2000, the Government decided that it was no longer proportionate or in the public interest to seek the extradition of individuals convicted of terrorist offences prior to 10th April 1998, "who appear to qualify for early release under the Good Friday Agreement scheme, and who would, on making a successful application to the Sentence Review Commissioners, have little if any of their original prison sentence to serve." I attach a copy of the statement made by the then Secretary of State for Northern Ireland when this decision was announced. I know that the former Home Secretary reiterated this when he wrote to you in March this year. I can confirm, on behalf of the UK Government, that this remains the case.

We have also made it clear that we want to address the anomalous position of those suspected but not yet convicted of terrorism-related offences committed before the Belfast Agreement. Had these individuals been convicted at the time of their offences they would, by now, have been able to apply for early release and so find themselves in a similar position to those already covered by the Agreement. The UK Government introduced legislation to resolve this anomaly last year. Unfortunately, that legislation had to be withdrawn due to a lack of cross-party support. However, the UK Government continues to accept that the position of these people is anomalous and I can assure you, as the former Home Secretary did in March, that when the new treaty was being negotiated there was no intention on our part to make it easier to target them. I attach a short note which explains in more detail the provisions of the early release scheme and the position of various groups of people.

It remains a matter of great importance to the UK Government that the extradition treaty should be ratified by the United States, so that its benefits can be fully realised. This is not because of any agenda related to Northern Ireland, but because of the improvements that the updated treaty will bring to the extradition process in general in both countries. My colleague, John Reid, the Home Secretary, has seen this letter and agrees fully with its contents.

I am copying this letter to Senator Lugar. Both you and he are welcome to share it with other members of the Senate if that would be helpful.

An attachment to Secretary Hain's letter, also reprinted in Exec. Rept. 109-19, provided further information on the Good Friday Agreement and Early Release Scheme, stating in part:

> As part of the Good Friday Agreement (GFA), individuals convicted of terrorist-related offences *committed before 1998* were able to apply for early release after serving only two years of their sentences. Over 400 prisoners have been released on license under this scheme. The license requires that individuals do not become re-engaged in terrorism or serious crime. Those released include many

members of the Provisional IRA, which has maintained a ceasefire during this time. The Early Release Scheme was a very difficult part of the Good Friday Agreement for many people to accept, but it demonstrated the UK Government's commitment to moving forward with the peace process.

The Early Release Scheme is part of UK law and remains in force. Any individuals who are convicted of qualifying, pre-1998 offences in the future, including any individuals extradited to the UK, will be able to apply for the scheme.

* * * *

Outstanding warrants

When Home Office Minister Baroness Scotland visited the US, she explained that there were currently no outstanding warrants for the extradition of individuals from the US to Northern Ireland.

In a response dated September 5, 2006, U.S. Attorney General Alberto R. Gonzales stated: "Please accept this letter as my acknowledgement of your Government's official position and our mutual understanding of these matters. I believe that we share the view that the 2003 Treaty is critical to our mutual security in this age of global terrorism and transnational crime. . . ."

On September 29, 2006, the Senate adopted the resolution of advice and consent to ratification. 152 CONG.REC. S10766. The resolution contained understandings and declarations, as set forth below.

Resolved (two-thirds of the Senators present concurring therein),

Section 1. Senate Advice and Consent Subject to Understanding, Declarations, and Provisos

The Senate advises and consents to the ratification of the Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and related exchanges of letters, signed at Washington on March 31, 2003

(hereinafter in this resolution referred to as the "Treaty") (Treaty Doc. 108-23), subject to the understanding in section 2, the declarations in section 3, and the provisos in section 4.

Section 2. Understanding

The advice and consent of the Senate under section 1 is subject to the following understanding:

Under United States law, a United States judge makes a certification of extraditability of a fugitive to the Secretary of State. In the process of making such certification, a United States judge also makes determinations regarding the application of the political offense exception. Accordingly, the United States of America understands that the statement in paragraphs 3 and 4 of Article 4 that "in the United States, the executive branch is the competent authority for the purposes of this Article" applies only to those specific paragraphs of Article 4, and does not alter or affect the role of the United States judiciary in making certifications of extraditability or determinations of the application of the political offense exception.

Section 3. Declarations

The advice and consent of the Senate under section 1 is subject to the following declarations:

(1) Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States.

(2) The Treaty shall be implemented by the United States in accordance with the Constitution of the United States and relevant federal law, including the requirement of a judicial determination of extraditability that is set forth in Title 18 of the United States Code.

Section 4. Provisos

The advice and consent of the Senate under section 1 is subject to the following provisos:

(1)(A) The Senate is aware that concerns have been expressed that the purpose of the Treaty is to seek the extradition of individuals involved in offenses relating to the conflict in Northern Ireland prior to the Belfast Agreement of April 10, 1998. The Senate understands that the purpose of the Treaty is to strengthen law enforcement cooperation between the United States and the United Kingdom by modernizing the extradition process for all serious offenses and that the Treaty is not intended to reopen issues

addressed in the Belfast Agreement, or to impede any further efforts to resolve the conflict in Northern Ireland.

(B) Accordingly, the Senate notes with approval—

(i) the statement of the United Kingdom Secretary of State for Northern Ireland, made on September 29, 2000, that the United Kingdom does not intend to seek the extradition of individuals who appear to qualify for early release under the Belfast Agreement;

(ii) the letter from the United Kingdom Home Secretary to the United States Attorney General in March 2006, emphasizing that the "new treaty does not change this position in any way," and making clear that the United Kingdom "want[s] to address the anomalous position of those suspected but not yet convicted of terrorism-related offences committed before the Belfast Agreement"; and

(iii) that these policies were reconfirmed in an exchange of letters between the United Kingdom Secretary of State for Northern Ireland and the United States Attorney General in September 2006.

(2) The Senate notes that, as in other recent United States extradition treaties, the Treaty does not address the situation where the fugitive is sought for trial on an offense for which he had previously been acquitted in the Requesting State. The Senate further notes that a United Kingdom domestic law may allow for the retrial in the United Kingdom, in certain limited circumstances, of an individual who has previously been tried and acquitted in that country. In this regard, the Senate understands that under U.S. law and practice a person sought for extradition can present a claim to the Secretary of State that an aspect of foreign law that may permit retrial may result in an unfairness that the Secretary could conclude warrants denial of the extradition request. The Senate urges the Secretary of State to review carefully any such claims made involving a request for extradition that implicates this provision of United Kingdom domestic law.

(3) Not later than one year after entry into force of the Treaty, and annually thereafter for a period of four additional years, the Secretary of State shall submit to the Committee on Foreign Relations of the Senate a report setting forth the following information with respect to the implementation of the Treaty in the previous twelve months:

(A) the number of persons arrested in the United States pursuant to requests from the United Kingdom under the Treaty, including

the number of persons subject to provisional arrest; and a summary description of the alleged conduct for which the United Kingdom is seeking extradition;

(B) the number of extradition requests granted; and the number of extradition requests denied, including whether the request was denied as a result of a judicial decision or a decision of the Secretary of State;

(C) the number of instances the person sought for extradition made a claim to the Secretary of State of political motivation, unjustifiable delay, or retrial after acquittal and whether such extradition requests were denied or granted; and

(D) the number of instances the Secretary granted a request under Article 18(1)(c).

(2) U.S.-EU extradition agreement

On September 28, 2006, President Bush transmitted to the Senate for advice and consent to ratification the Agreement on Extradition Between the United States of America and the European Union ("U.S.-EU Extradition Agreement" or "Agreement"), signed on June 25, 2003, at Washington, together with twenty-two bilateral instruments subsequently signed between the United States and each European Union ("EU") member state in order to implement the agreement with the EU and an explanatory note that is an integral part of the U.S.-EU Extradition Agreement. S. Treaty Doc. 109-14. The President also transmitted, for the information of the Senate, the report of the Department of State with respect to the Agreement and bilateral instruments. Bilateral instruments with three EU Member States, Estonia, Latvia, and Malta, take the form of comprehensive new extradition treaties and were therefore transmitted individually. *See* a.(3) below. The President's letter summarized the role of the Agreement and a U.S.-EU agreement on mutual legal assistance, transmitted separately on the same day (*see* b.(1) below), as follows:

> . . . These two agreements are the first law enforcement agreements concluded between the United States and the European Union. Together they serve to modernize and expand in important respects the law enforcement relationships between the United States and the 25 EU

> Member States, as well as formalize and strengthen the institutional framework for law enforcement relations between the United States and the European Union itself.

The President's letter continued:

> The U.S.-EU Extradition Agreement contains several provisions that should improve the scope and operation of bilateral extradition treaties in force between the United States and each EU Member State. For example, it requires replacing outdated lists of extraditable offenses included in 10 older bilateral treaties with the modern "dual criminality" approach, thereby enabling coverage of such newer offenses as money laundering. Another important provision ensures that a U.S. extradition request is not disfavored by an EU Member State that receives a competing request for the person from another Member State pursuant to the newly created European Arrest Warrant. Finally, the Extradition Agreement simplifies procedural requirements for preparing and transmitting extradition documents, easing and speeding the current process.

Excerpts follow from the report of the Department of State.

* * * *

OVERVIEW

The U.S.-EU Extradition Agreement selectively amends and supplements existing United States bilateral extradition treaties with all Member States of the EU. A counterpart Agreement on Mutual Legal Assistance between the United States and the European Union is being submitted separately.

Both U.S.-EU Agreements have their origin in a period of intensive consultation between the United States and officials of the European Union and its then-Belgian and Spanish Presidencies, in the aftermath of the September 11, 2001, terrorist attacks, on ways of improving trans-Atlantic cooperation against terrorism. These discussions led to the conclusion that modernization of existing bilateral extradition treaties between the United States

and EU Member States would be a valuable step, because a number of such treaties were concluded in the early 20th century and do not reflect more recent improvements in extradition practice. By concluding agreements with the European Union, the United States could achieve uniform improvements and expansions in coverage across much of Europe. In addition, the U.S.-EU Agreements would enable the strengthening of an emerging institutional relationship on law enforcement matters between the United States and the European Union, during a period when the EU is actively harmonizing national criminal law procedures and methods of international cooperation.

Negotiation of the U.S.-EU Agreements were conducted during 2002 and 2003. The European Union's delegation was led by officials from Denmark and Greece, which held the EU's rotating Presidency at that time, and also included officials from the Council and Commission. After the U.S.-EU Agreements were signed on June 25, 2003, the United States pursued negotiation with each Member State of implementing bilateral extradition instruments. Initial efforts focused on the fifteen states which were members of the European Union at the time the U.S.-EU Agreements were signed, and then expanded to the additional ten states that joined the EU in 2004. The last of the bilateral instruments were signed on June 9, 2006.

The U.S.-EU Extradition Agreement and bilateral instruments are regarded as self-executing treaties under U.S. law, and thus will not require implementing legislation for the United States. With respect to implementation within the European Union, there is greater complexity. The EU, as a Contracting Party, is responsible for implementation of the obligations contained in the U.S.-EU Extradition Agreement, even though practical application of those obligations would occur at the Member State level. The EU Council would monitor implementation, and empower the Presidency as necessary to ensure that Member States comply in all respects. EU Member States, while formally not Contracting Parties to the U.S.-EU Extradition Agreement, are bound to its provisions under internal EU law. The Member States also would have international obligations to the United States under the bilateral instruments. Most Member States, in order to comply with the requirements of

their domestic constitutional order, are, like the United States, pursuing domestic processes in order to ratify both the U.S.-EU Extradition Agreement and the bilateral instrument. A number of Member States also secured domestic parliamentary endorsement of the U.S.-EU Extradition Agreement prior to its signature.

The following is an article-by-article description of the provisions of the U.S.-EU Extradition Agreement.

The Preamble underscores that cooperation between the United States and European Union Member States serves to protect democratic society and our common values, including the rights of individuals and the rule of law.

Article 1 ("Object and Purpose") states that the United States and the EU undertake to provide enhancements to cooperation in the context of applicable extradition relations between the United States and individual EU Member States, in the manner provided in the U.S.-EU Extradition Agreement. Since extradition between the United States and EU Member States is carried out pursuant to bilateral extradition treaties, this phrasing underscores the obligation to supplement and, where necessary, modify these existing bilateral treaties to effectuate the terms of the U.S.-EU Extradition Agreement.

* * * *

Article 3 ("Scope of application") (1) provides that the Contracting Parties shall ensure that the provisions of the U.S.-EU Extradition Agreement are applied in relation to existing bilateral extradition treaties between the United States and EU Member States. Thus the EU is responsible as the Party to the Agreement for ensuring that Member States make the necessary changes in their bilateral extradition relationships with the United States.

The remainder of Article 3(1) specifies the manner in which existing bilateral extradition treaties between the United States and EU Member States are affected by Articles 4-14 of the U.S.-EU Extradition Agreement. Some of these articles serve to supplement or modify the existing provisions in all bilateral extradition treaties between the United States and EU Member States, while others only affect certain bilateral treaties. There were two main reasons for this approach. One was to update a significant number of

outmoded extradition treaties in force between the United States and EU Member States that were 35 to 100 years old, but not to affect more modern treaties that already had similar or identical provisions to those contained in the U.S.-EU Extradition Agreement. The other reason was that certain provisions contained in the U.S.-EU Extradition Agreement facilitated cooperation to a greater extent than some existing bilateral treaties. Article 3 therefore ensures that the U.S.-EU Extradition Agreement's provisions affect only those bilateral treaties that would be enhanced thereby.

* * * *

The extent to which current individual extradition treaties with EU Member States are modified or supplemented by application of these substantive provisions is described later in this analysis, on a country-by-country basis.

Article 3(2) elaborates on the EU's obligation to ensure the application of the provisions of the U.S.-EU Extradition Agreement by its Member States. Specifically, the EU shall ensure that each Member State acknowledges the consequential changes to its existing bilateral extradition treaty by entering into a written "instrument" with the United States, that is, a free-standing international agreement binding under international law. The EU also must ensure that countries acceding to the European Union after the entry into force of the U.S.-EU Extradition Agreement and having extradition treaties with the United States conclude bilateral instruments with the United States after accession or preferably prior thereto.

Paragraph 3 states that the U.S.-EU Extradition Agreement shall apply in extradition relations between the United States and a new Member State from the date of notification that internal procedures for the bilateral instrument have been completed.

There are both legal and practical reasons for the requirement of a bilateral instrument between the United States and each EU Member State. As a matter of international law, the conclusion of a bilateral instrument conveys to the United States the sovereign consent of the Member State to the changes required in treaties concluded and applied at the bilateral level, rather than relying entirely on the effect of EU internal law to ensure application of

changes in bilateral treaties to which the European Union itself is not party.

In addition, as a practical matter, since extradition treaties are litigated and interpreted extensively in national courts, it was seen as important to delineate in instruments concluded at the bilateral level the changes made by the U.S.-EU Extradition Agreement in these bilateral treaties. The consequential changes are set out either in a revised integrated text of the particular treaty (included as an Annex to the instrument) or in provisions placed in the instrument itself specifically delineating the new operative language. Conclusion of bilateral instruments thus serves to ease application of the revised treaties for practitioners and the judiciary.

* * * *

Article 6 ("Transmission of requests for provisional arrest") is intended, pursuant to Article 3(1)(c), to supplement the terms of some old extradition treaties in which there is currently no provision for provisional arrest requests to be sent directly between the U.S. Department of Justice and the foreign Ministry of Justice. Article 6 also permits the use of Interpol as an alternative channel for submission of provisional arrest requests. These channels typically are more rapid than the diplomatic channel and, therefore, are particularly useful for making provisional arrest requests when time is of the essence.

Article 7 ("Transmission of documents following provisional arrest") supplements the terms of existing bilateral extradition treaties between the United States and EU Member State[s] (see Article 3(1)(d)). It provides that the requesting State may satisfy its obligation to transmit its extradition request and supporting documents within the time limit specified following the provisional arrest of the fugitive, by submitting them to the embassy of the requested State in the requesting State. This approach, already provided for in several recent U.S. extradition treaties, *e.g.* the 2001 treaty with Lithuania, codifies existing jurisprudence (*see, e.g., United States v. Wiebe*, 733 F.2d 549 (8th Cir. 1984), and *Bozilov v. Seiffert*, 983 F.2d 140 (9th Cir., 1993)).

* * * *

Article 10 ("Request for extradition or surrender made by several States") replaces existing provisions of bilateral extradition treaties concerning competing requests for extradition and supplements existing treaties that contain no such provision (*see* Article 3(1)(g). Paragraph 1 provides that the executive authority of the requested State shall determine to which State to surrender a person whose extradition is sought by more than one State. Paragraph 2 provides that if an EU Member State receives a request for surrender pursuant to the European Arrest Warrant ("EAW") and a request for extradition from the United States, the designated competent authority of the EU Member State shall determine to which State to surrender the person. Paragraph 3 contains a non-exhaustive list of factors to be considered in making a determination under either of these scenarios. As a result, this provision makes clear, as a matter of treaty law, that a EAW request to one EU Member State from another does not take precedence over a competing U.S. extradition request. Since the merits of both requests are judged by the paragraph 3 criteria, the provision bestows the same status upon a U.S. request for extradition as upon a request for surrender under the EAW, for purposes of determining which request shall be given priority.

In connection with Article 10, the Explanatory Note to the U.S.-EU Extradition Agreement states that the Contracting Parties agree that this provision is not intended to affect the obligations of States Parties to the International Criminal Court (ICC) or the rights of the United States as a non-Party to the ICC. This reflects that the U.S.-EU Extradition Agreement does not provide a legal basis for the ICC to take jurisdiction over U.S. persons, or for an EU Member State to extradite U.S. persons to the ICC.

* * * *

Article 13 ("Capital punishment") provides that when an offense for which extradition is sought is punishable by death under the laws in the requesting State but not under the laws in the requested State, the requested State may grant extradition on condition that the death penalty shall not be imposed or, if for procedural reasons such condition cannot be complied with by the requesting State, on condition that if imposed the death penalty

shall not be carried out. This formulation is analogous to those of other modern U.S. extradition treaties and corresponds to the practice that has developed in death penalty cases. In essence, where prosecuting authorities have discretion to not seek the death penalty, the requested State may subject extradition to the condition that the death penalty not be imposed. However, where, under the procedures applicable in the jurisdiction seeking extradition, this discretion is not absolute, an assurance of non-imposition of the death penalty cannot be made. In this case, extradition may be subjected only to the condition that if the death penalty is imposed, it shall not be carried out. Under Article 3(1)(j), this provision may be applied to replace existing provisions on capital punishment or where the existing treaty contains no such provision.

* * * *

Article 17 ("Non-derogation"), paragraph 1, makes clear that the U.S.-EU Extradition Agreement's provisions do not preclude the assertion of a ground for refusal set forth in the applicable extradition treaty in respect of a matter not governed by the U.S.-EU Extradition Agreement. Under paragraph 2, consultations are to take place between the requesting and requested States should a constitutional principle or judicial decision binding upon the requested State pose an impediment to the fulfillment of the obligation to extradite, and resolution of the matter is not provided for in the U.S.-EU Extradition Agreement or the applicable bilateral extradition treaty. Such situations occasionally arise in extradition relations as constitutional jurisprudence evolves in national courts.

* * * *

Under Article 20 ("Territorial application"), paragraph 1, the U.S.-EU Extradition Agreement applies to the United States of America, to EU Member States, to territories for whose external relations a Member State is responsible, and to countries for whom the member has other duties pertaining to their external relations, where agreed upon by exchange of diplomatic note between the EU and United States, duly confirmed by the relevant Member State. Several EU Member States have such responsibilities; hence, this enables the United States and the EU to agree to include such

territories or countries within the ambit of the U.S.-EU Extradition Agreement. . . .

Bilateral Instruments between the United States and EU Member States implementing the U.S.-EU Extradition Agreement

As noted above, Article 3(2) of the U.S.-EU Extradition Agreement requires the conclusion of a written instrument between the United States and each Member State, indicating the application of the Agreement's provisions in the bilateral extradition relationship. The following discussion delineates the content and character of each of these instruments (except for the three that take the form of full treaties), and any understandings reached between the United States and individual Member States in the course of negotiations.

The title chosen for the "written instrument" required by Article 3(2) of the U.S.-EU Extradition Agreement varies among the Member States. Most Member States preferred to retain the general term "Instrument" as used in the U.S.-EU Agreement, but others preferred more specific descriptions utilized under their national law that also are consistent with the binding character of the instrument under international law. . . .

Each instrument first expresses the agreement of the Parties to apply the provisions of the U.S.-EU Extradition Agreement under the terms laid out in Article 3 of that Agreement. The new textual provisions to be applied are either specified verbatim in the instrument or set out in an annex containing a revised consolidated text. The United States regarded the annex form as preferable from the perspective of U.S. courts and practitioners called upon to interpret a particular extradition treaty with a Member State. . . .

[Some] Member States, however, opted for non-integrated texts, in which only the newly operative supplemental or replacement language is set forth and is located in the instrument itself rather than in a separate annex. These Member States regarded inclusion of a consolidated text as not permitted by their domestic law. The consequence of the non-integrated approach is only that reference to both the instrument and the pre-existing treaty is

necessary in order to apply the entire set of obligations between the United States and the Member State.

Each instrument, for reasons of clarity, also recites the provision on temporal application from the U.S.-EU Extradition Agreement, stating that the instrument applies to offenses committed before as well as after it enters into force, but, in general, does not apply to requests made prior to its entry into force.

Instruments with several Member States required specification as to their geographic scope. These states—Denmark, the Netherlands and the United Kingdom—exercise foreign relations responsibilities for territories or independent countries, including applying the European state's law enforcement treaties on their behalf. However, since the geographic scope of the European Union for purposes of criminal justice cooperation does not necessarily extend to all these territories and countries, the provisions of the U.S.-EU Extradition Agreement would not apply to them unless specifically stipulated. Consequently, the relevant bilateral instruments spell out whether extradition relations with the United States in respect of these territories and countries would continue to be governed by the preexisting treaties in unmodified form.

Each bilateral instrument also contains a provision on entry into force and termination. . . .

The Department of State report then provided a brief summary of each of the bilateral implementing instruments:

- protocol of the 1998 U.S.-Austria Extradition Treaty, signed July 20, 2005;
- instrument with Belgium, signed December 16, 2004;
- instrument with Cyprus, signed January 20, 2006;
- second supplementary treaty to the 1925 U.S.-Czechoslovak Extradition Treaty and the 1935 Supplementary Extradition Treaty, signed May 16, 2006;
- agreement with Denmark, signed June 23, 2005;*

* Editor's note: The description of the agreement with Denmark states as follows concerning application: "Paragraph 3, in accordance with Article 20 of the U.S.-EU Extradition Agreement, provides that the instrument shall not apply to Greenland or the Faroe Islands unless the United States and the EU, by exchange of diplomatic notes duly confirmed by Denmark, subsequently agree otherwise."

03-Cummins-Chap03.indd 136 10/22/07 11:33:50 PM

- new bilateral extradition treaty with Estonia, signed February 8, 2006 (transmitted separately);
- protocol to the 1976 U.S.-Finland Extradition Treaty, signed December 16, 2004;
- instrument with France, signed September 30, 2004;
- second supplementary treaty to the 1978 U.S.-Germany Extradition Treaty and the 1986 Supplementary Extradition Treaty, signed April 18, 2006;
- protocol to the 1931 U.S.-Greece Extradition Treaty and its 1937 protocol, signed January 18, 2006;
- protocol to the 1994 U.S.-Hungary Extradition Treaty, signed November 15, 2005;
- instrument with Ireland, signed July 14, 2005;
- instrument with Italy, signed May 3, 2006;
- new bilateral extradition treaty with Latvia, signed December 7, 2005 (transmitted separately);
- protocol to the 2001 U.S.-Lithuania Extradition Treaty, signed June 15, 2005;
- instrument with Luxembourg, signed February 1, 2005;
- new bilateral extradition treaty with Malta, signed May 18, 2006 (transmitted separately);
- agreement with the Netherlands, signed September 29, 2004;**
- agreement with Poland, signed June 9, 2006;
- instrument with Portugal, signed July 14, 2005;***
- instrument with the Slovak Republic, signed February 6, 2006;
- agreement with Slovenia, signed October 17, 2005;

** Editor's note: The agreement with the Netherlands also stated: "Article 3, in accordance with Article 20 of the U.S.-EU Extradition Agreement, provides that the instrument shall not apply to the Netherlands Antilles or Aruba unless the United States and the EU, by exchange of diplomatic notes duly confirmed by the Netherlands, subsequently agree to extend its application to them."

*** Editor's note: The description of the instrument with Portugal addresses certain constitutional issues as follows:

> Paragraph 4 provides, in accordance with Article 17(2) of the U.S.-EU Extradition Agreement, that where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite, and neither

- instrument with Spain, signed December 17, 2004;
- instrument with Sweden, signed December 16, 2004; and
- instrument with the United Kingdom, signed December 16, 2004.****

(3) Other bilateral extradition treaties

As noted in the discussion above of the U.S.-EU Extradition Agreement, implementing instruments negotiated with Estonia, Latvia, and Malta took the form of comprehensive new extradition treaties and were therefore transmitted separately on September 29, 2006. The transmittal letter from President Bush stated that in the past each of the three countries has declined to extradite its nationals to the United States. For Estonia and Latvia, the President's letter explained that the new treaties provide that "extradition shall not be refused based on the nationality of a person sought"; the treaty with Latvia provides that Latvia may request that a Latvian national serve a U.S.-imposed sentence in a Latvian prison, pursuant to a prisoner transfer treaty. As to Malta, the treaty provides that "extradition shall not be refused based on the nationality of a person sought for any of a comprehensive list of serious offenses."

---

the Annex nor the 1908 U.S.-Portugal Convention on Extradition resolve the matter, consultations shall take place. At the time of signature of the instrument, Portugal made a unilateral declaration stating that under Portuguese constitutional law impediments exist to extradition with respect to offenses punishable by death or by imprisonment for life or for an unlimited duration, and that in the event that extradition could accordingly only be granted in accordance with specific conditions considered consistent with its onstitution, Portugal would invoke Paragraph 4 of the bilateral instrument.

**** Editor's note: The summary of the UK instrument states that it "foresees the entry into force of the 2003 U.S.-U.K. Extradition Treaty prior to, or contemporaneous with, the entry into force of the instrument." As to application, the summary states: "Paragraph 3, in accordance with Article 20 of the U.S.-EU Extradition Agreement, provides that the instrument applies to Great Britain and Northern Ireland, but not to the Channel Islands, the Isle of Man or other territories to which the 2003 Treaty applies."

03-Cummins-Chap03.indd 138 10/22/07 11:33:50 PM

The list of thirty offenses corresponds to those offenses for which Maltese nationals may be surrendered for trial to European Union member states.

The Extradition Treaty between the United States and the Government of the Republic of Estonia, signed on February 18, 2006, at Tallinn, would replace the extradition treaty between the United States and Estonia, signed on November 8, 1923, and the Supplementary Extradition Treaty, signed October 10, 1934. S. Treaty Doc. 109-16. The Extradition Treaty Between the United States of America and the Government of the Republic of Latvia, signed on December 7, 2005, at Riga, would replace the extradition treaty between the United States and Latvia signed October 16, 1923, and the Supplementary Extradition Treaty, signed October 10, 1934. S. Treaty Doc. 109-15. The Extradition Treaty Between the United States of America and the Government of Malta would replace the outdated extradition treaty between the United States and Great Britain, signed December 22, 1931, and made applicable to Malta on June 24, 1935. S. Treaty Doc. 109-17.

b. Mutual legal assistance treaties

(1) U.S.-EU mutual legal assistance agreement

As noted in 1.a. *supra*, on September 28, 2006, President Bush transmitted to the Senate for advice and consent to ratification the Agreement on Mutual Legal Assistance Between the United States of America and the European Union, signed on June 25, 2003, at Washington ("U.S.-EU Mutual Legal Assistance Agreement" or "Agreement"), together with twenty-five bilateral instruments subsequently signed between the United States and each European Union member state in order to implement the agreement with the EU, and an explanatory note that is an integral part of the agreement. S. Treaty Doc. 109-13. The President also transmitted for the information of the Senate the report of the Department of

State with respect to the Agreement and bilateral instruments. The President stated:

> The U.S.-EU Mutual Legal Assistance Agreement contains several innovations that should prove of value to U.S. prosecutors and investigators, including in counterterrorism cases. The Agreement creates an improved mechanism for obtaining bank information from an EU Member State, elaborates legal frameworks for the use of new techniques such as joint investigative teams, and establishes a comprehensive and uniform framework for limitations on the use of personal and other data. The Agreement includes a non-derogation provision making clear that it is without prejudice to the ability of the United States or an EU Member State to refuse assistance where doing so would prejudice its sovereignty, security, public, or other essential interests.

The mutual legal assistance instruments, like the extradition instruments discussed above, will be self-executing in the United States.

As explained in the section-by-section analysis of the Department of State report, a paragraph was added to Article 3 ("Scope of application") to address the fact that some of the EU member states did not have pre-existing mutual legal assistance treaties with the United States:

> Article 3(3) provides that both the United States and the European Union are obliged to ensure the application of the U.S.-EU Mutual Legal Assistance Agreement by Member States lacking an existing bilateral MLAT with the United States. Such a Member State also must enter into a written "instrument" with the United States. Countries acceding to the European Union after the entry into force of the U.S.-EU Mutual Legal Assistance Agreement and not having mutual legal assistance treaties with the United States likewise are obliged to conclude bilateral instruments with the United States after accession, and are encouraged to do so prior to their accession.

Additional excerpts from the Department of State report follow.

* * * *

Article 4 ("Identification of bank information") is one of the provisions included in order to provide a form of assistance not specifically set forth in existing mutual legal assistance treaties. Its terms supplement the provisions of all existing treaties with EU Member States, and apply in the absence of a treaty.

Mutual legal assistance treaties generally address the production of records located in the requested State. For such provisions to function properly with respect to bank and other business records, a requesting State must provide sufficient information regarding the bank branch or account involved to enable the records to be located and produced. In the Protocol to the European Union Mutual Legal Assistance Treaty, which applies among EU Member States, Article 1 went a step further by establishing a procedure by which a requested State is obligated to search on a centralized basis for bank accounts located within its territory that may be important to a criminal investigation in the requesting State. Section 314(a) of the USA Patriot Act established a comparable centralized mechanism by which the Treasury Department's Financial Crime Information Center ("FinCen") can query domestic banking institutions in order to locate transactions or accounts that may be involved in money laundering or terrorism violations. The availability of these existing comparable mechanisms provided a basis for Article 4 of the U.S.-EU Mutual Legal Assistance Agreement.

* * * *

Under Article 4 paragraph 4(a), a State may limit its obligation to provide assistance under this Article to certain forms of criminality, specifically: (i) offenses punishable under the laws of the requesting and requested States (i.e., conduct as to which there is dual criminality standard); (ii) offenses punishable by a maximum penalty of at least two years in the requested State and four years in the requesting State (i.e., a modified application of the dual criminality standard); or (iii) designated offenses punishable under the laws of the requesting and

requested States. A State may also make application of Article 4 unlimited in scope (i.e., no dual criminality requirement).

Under paragraph 4(b), should a State choose to limit the scope of its obligation to provide assistance under the options set forth in paragraphs 4(a)(ii) or (iii), it must at a minimum provide assistance with respect to terrorist activity and laundering of proceeds generated from a comprehensive range of serious criminal activities punishable under the laws of both the requesting and requested States. In the bilateral instruments between the United States and EU Member States implementing the U.S.-EU Mutual Legal Assistance Agreement, the United States, consistent with the scope of Section 314(a) of the USA Patriot Act, chose to limit application of this measure to terrorist and money laundering activity punishable in both the requesting and requested States, and to such criminal activity as may subsequently be agreed between the Parties (so that the scope of assistance could be expanded in the future in a manner corresponding to any future expansion of U.S. domestic legislation). Most EU Member States, in turn, chose also to provide assistance to the same extent, but, as will be described in the country-by-country analysis of bilateral instruments that follows, a number agreed to provide assistance under this Article more broadly. Those EU Member States that chose to provide assistance to the same extent as the United States assured the United States that assistance would be available with respect to a wide range of conduct associated with terrorism (which includes the conduct criminalized in international counter-terrorism conventions to which they are party), and money laundering with respect to an extremely broad range of predicate offenses. The U.S. negotiators in turn provided the same assurance.

* * * *

Article 5 ("Joint investigative teams") also provides a form of cooperation not explicitly provided for in existing United States bilateral mutual legal assistance treaties, and its terms supplement the provisions of existing treaties and apply in the absence of a treaty. Paragraph 1 requires the Parties to provide for the necessary legal authority to establish and operate joint investigative teams in the respective territories of the United States and the EU

Member States, where the States concerned agree to do so. For the United States, the legal authority to engage in such cooperation with foreign authorities already exists under the statutory and regulatory frameworks for U.S. law enforcement agencies. For some EU Member States, however, an obligation to assist set forth in a binding legal instrument was deemed necessary to permit operation of joint teams in a broad variety of circumstances, such as a joint team similar in complexity to a U.S. domestic law enforcement task force, in which both police and prosecutorial components (or the investigative magistrate that in some EU countries performs this function) participate simultaneously.

Under Article 5(2), the manner of the team's operation shall be agreed between the competent authorities determined by the respective States concerned.

Article 5(3) describes channels of communication. The competent authorities determined by the respective States concerned shall communicate directly for purposes of establishment and operation of such team, except where the complexity, scope, or other circumstances involved are deemed to require more central coordination, in which case the States concerned may agree upon other channels of communication. This approach facilitates speed, efficiency, and clarity by providing for direct communications in most cases among the affected law enforcement components, rather than through a mutual legal assistance request transmitted through the Central Authority, as would otherwise take place pursuant to a bilateral MLAT.

Article 5(4) states that where the joint investigative team needs investigative measures to be taken in one of the States involved in the team, a member of the team of that State may request its own competent authorities to take those measures without the other State having to submit a mutual legal assistance request. The legal standard for obtaining the measure is the applicable domestic standard. In other words, where an investigative measure is to be carried out in the United States, for example, a U.S. team member would do so by invoking existing domestic investigative authority, and would share resulting information or evidence seized pursuant to existing authority to share with foreign authorities. An MLAT request would not be required. Of course, in a case in which there is no domestic U.S. jurisdiction and consequently a compulsory

measure cannot be carried out based on domestic authority, the other provisions of the bilateral MLAT in force (or, absent an MLAT, the provisions of 28 U.S.C. Section 1782 or other provisions) may furnish a separate legal basis for carrying out such measure.

Article 6 ("Video-conferencing") also supplements the terms of existing bilateral mutual legal assistance treaties and applies in the absence of a treaty. Paragraph 1 requires the Parties to provide for the necessary legal authority to use video transmission technology between the United States and the EU Member States for the purpose of taking witness testimony sought by the requesting State. The procedures to be applied in taking such testimony are as otherwise set forth in the applicable mutual legal assistance treaty in force (e.g., provisions governing execution of requests, or procedures for taking of testimony in the requested State), or—either in the absence of a treaty or where the terms of the treaty so provide—under the law of the requested State. Here too, general provisions of bilateral MLATs already in force and 28 U.S.C. Section 1782 already enable the United States to provide this form of cooperation on behalf of a foreign State, but a separate provision was deemed useful to enable a number of EU Member States to provide the same cooperation to the United States.

* * * *

Article 9(1) permits the requesting State to use evidence or information it has obtained from the requested State for its criminal investigations and proceedings, for preventing an immediate and serious threat to its public security, for non-criminal judicial or administrative proceedings directly related to its criminal investigations, for non-criminal judicial or administrative proceedings for which assistance was provided under Article 8, and for any other purpose if the information or evidence was made public within the framework of the proceedings for which it was transmitted or pursuant to the above permissible uses. Other uses of the evidence or information require the prior consent of the requested State. . . .

Article 9(2)(a) specifies that the article does not preclude the requested State from imposing additional conditions where the particular request for assistance could not be granted in the absence

of such conditions. Where such additional conditions are imposed, the requested State may require the requesting State to give information on the use made of the evidence or information.

Article 9(2)(b) provides that generic restrictions with respect to the legal standards in the requesting State for processing personal data may not be imposed by the requested State as a condition under paragraph 2(a) to providing evidence or information. This is further elaborated upon in the explanatory note to the U.S.-EU Mutual Legal Assistance Agreement, which specifies that the fact that the requesting and requested States have different systems of protecting the privacy of data does not give rise to a ground for refusal of assistance, and may not as such give rise to additional conditions under paragraph 2(a). Such refusal of assistance could only arise in exceptional cases in which, upon balancing the important interests involved in the particular case, furnishing the specific data sought by the requesting State would raise difficulties so fundamental as to be considered by the requested State to fall within the essential interests grounds for refusal.

* * * *

Article 14 ("Future bilateral mutual legal assistance treaties with Member States") provides that the United States and EU Member States may conclude future mutual legal assistance agreements consistent with the U.S.-EU Mutual legal Assistance Agreement. In the Explanatory Note, it is clarified that should measures set forth in the U.S.-EU Mutual Legal Assistance Agreement create operational difficulties for the United States or a Member State, and consultations alone cannot remedy the difficulty, a future bilateral agreement with the Member State could contain an operationally feasible alternative mechanism that satisfies the objectives of the provision in question.

* * * *

Under Article 16(1) ("Territorial application"), the U.S.-EU Mutual Legal Assistance Agreement applies to the United States of America, to EU Member States, to territories for whose external relations a Member State is responsible, and to countries for whom the member has other duties pertaining to their external relations, where agreed upon by exchange of diplomatic note between the

EU and United States, duly confirmed by the relevant Member State. Several EU Member States have such responsibilities; hence, this enables the United States and EU to agree to include such territories or countries within the ambit of the U.S.-EU Mutual Legal Assistance Agreement. . . .

* * * *

The Department of State report then provided brief summaries of each of the bilateral implementing instruments transmitted with the U.S.-EU agreement:

- protocol to the 1995 U.S.-Austria Mutual Legal Assistance Treaty, signed July 20, 2005;
- instrument with Belgium, signed December 16, 2004;
- instrument with Cyprus, signed January 20, 2006;
- supplementary treaty to the 1998 U.S.-Czech Mutual Legal Assistance Treaty, signed May 16, 2006;
- agreement with Denmark, signed June 23, 2005;*#
- instrument with Estonia, signed February 8, 2006;
- treaty with Finland, signed December 16, 2004;*
- instrument with France, signed September 30, 2004;
- supplementary treaty to the 2003 U.S.-Germany Mutual Legal Assistance Treaty, signed April 18, 2006;
- protocol to the 1999 U.S.-Greece Mutual Legal Assistance Treaty, signed January 18, 2006;

---

* As explained in the report, for member states with whom the United States does not have a bilateral mutual legal assistance treaty in force (Denmark, Finland, Malta, Portugal, the Slovak Republic, and Slovenia):

> the bilateral agreement is a partial one governing only those issues regulated by the U.S.-EU Mutual Legal Assistance Agreement, specifically: Article 4 (identification of bank information), 5 (joint investigative teams), 6 (video conferencing), 7 (expedited transmission of requests), 8 (assistance to administrative or regulatory authorities), 9 (use limitations), 10 (requesting State's request for confidentiality), and 13 (grounds for refusal).

For Denmark, the report instrument "provides that [it] shall not apply to Greenland or the Faroe Islands unless the United States and the EU, by exchange of diplomatic notes duly confirmed by Denmark, subsequently agree otherwise."

- protocol to the 1994 U.S.-Hungary Mutual Legal Assistance Treaty, signed November 15, 2005;
- instrument with Ireland, signed on July 14, 2005;
- instrument with Italy, signed May 3, 2006;
- protocol to the 1997 U.S.-Latvia Mutual Legal Assistance Treaty, signed December 7, 2005;
- protocol to the 1998 U.S.-Lithuania Mutual Legal Assistance Treaty;
- instrument with Luxembourg, signed February 1, 2005;
- instrument with Malta, signed May 18, 2006;*
- agreement with the Netherlands, signed September 29, 2004;##
- agreement with Poland, signed June 9, 2006;
- instrument with Portugal, signed July 14, 2005;*
- instrument with the Slovak Republic, signed February 6, 2006;*
- agreement with Slovenia, signed October 17, 2005;*
- instrument with Spain, signed December 17, 2004;
- instrument with Sweden, signed December 16, 2004; and
- instrument with the United Kingdom, signed December 16, 2004.###

(2) Other mutual legal assistance treaties

(i) Malaysia

On November, 2006, President Bush transmitted the Treaty Between the United States of America and Malaysia on Mutual Legal Assistance in Criminal Matters, signed on July 28, 2006, at Kuala Lumpur. *See* S. Treaty Doc. 109-22, which includes

The report states: "Article 3 [of the agreement with the Netherlands] provides that the bilateral agreement shall not apply to the Netherlands Antilles or Aruba unless the United States and the EU, by exchange of diplomatic notes, subsequently agree to extend its application to them."

The report states that the instrument "provides that [it] applies to Great Britain and Northern Ireland, but not to the Channel Islands, the Isle of Man or other territories to which the 1994 U.S.-UK Mutual Legal Assistance Treaty applies."

the text of the treaty and the report of the Department of State included for the information of the Senate.

(ii) Ratification of treaties with Germany and Japan

On April 6, 2006, the Senate Committee on Foreign Relations reported the Treaty between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 14, 2003, and a related exchange of notes (S. Treaty Doc. 108-27), and the Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters, signed at Washington on August 5, 2003 (S. Treaty Doc. 108-12), to the full Senate recommending that the Senate give its advice and consent to ratification. S. Exec. Rep. No. 109-14.

The Senate gave its advice and consent to ratification of the treaty with Japan on April 7, 2006, 152 CONG. REC. S3400, and to the treaty with Germany on July 27, 2006, 152 CONG. REC. S8397. The U.S.-Japan treaty entered into force July 21, 2006.

2. Judicial Reviewability of Secretary of State Decision to Extradite

a. Mironescu v. Costner

On January 20, 2006, the U.S. District Court for the Middle District of North Carolina denied a U.S. motion to dismiss a petition for writ of habeas corpus filed after the signing of a warrant for the fugitive's surrender for extradition. *Mironescu v. Rice*, 2006 U.S. Dist. LEXIS 3636 (M.D.N.C. 2006). In its decision, the court also denied Mironescu's motion for bail pending appeal and dismissed Secretary of State Rice as a named party "because the Secretary is not the immediate custodian" of the petitioner.

Petitioner in the case, Petru Mironescu, a citizen of Romania, argued that he would likely be tortured if returned to Romania to serve a four-year sentence for charges related to auto theft. The United States had moved to dismiss the petition arguing, among other things, that under the Rule of

Non-Inquiry, courts do not inquire into the conditions or treatment that a fugitive may face after extradition because such issues are for the consideration of the Secretary of State when deciding whether extradition should be granted or denied, and that no statute provided a basis for reviewing the Secretary's decision. *See Digest 2005* at 79-89 for U.S. brief filed October 3, 2005, on these issues.

The United States appealed and filed a brief with the U.S. Court of Appeals for the Fourth Circuit on May 24, 2006. The case was pending at the end of the year, following oral argument in November 2006.

Excerpts follow from the district court decision and the government's brief on appeal. The full text of the government's brief is available at *www.state.gov/s/l/c8183.htm*.

District Court decision

* * * *

. . . The Rule of Non-Inquiry is a doctrine in which the federal courts have historically refused to consider the conditions of the penal systems of requesting nations, such as Romania, and instead deferred to the Secretary's decision concerning whether an individual would be treated humanely by the requesting nation.

. . . However, in 1998, Congress passed legislation, known as the FARR Act, to implement Article 3 of the [Convention Against Torture ("CAT")]. This implementing legislation states that "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." FARR Act, § 2242(a). The FARR Act goes on to state that "notwithstanding any other provision of law . . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section [this note] shall be construed as providing any court jurisdiction to consider or review claims raised under this Convention or this section [this note], or any other determination

made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252)." *Id.* § 2242(d).

The FARR Act also required the Department of State to prescribe regulations as to the obligations of the United States under Article 3 of the CAT. The Department of State did in fact set forth implementing regulations. . . .

The Government's position is that the Rule of Non-Inquiry as to extradition decisions remains unchanged by the CAT and the FARR Act, and that the FARR Act and its implementing regulations specifically state that this Court has no jurisdiction over the matter. However, Petitioner's position is that the Secretary's decision to extradite is no longer discretionary, and in fact, the FARR Act requires the Secretary not to extradite an individual if that individual can show it is more likely than not he will be tortured. Accordingly, Petitioner argues such a non-discretionary decision may be reviewed by this Court under the APA. . . .

A. Petitioner's Position and Authority

Petitioner argues that this Court should follow the rule of *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th 2000) ("*Cornejo Barreto I*") to determine that Petitioner has a right to judicial review under the APA. *Cornejo-Barreto I*, once disapproved of in the Ninth Circuit Court of Appeals, has now sprung back to life and remains good law. *See Prasoprat v. Benov*, 421 F.3d 1009, 1012 n.1 (9th Cir. 2005) ("The holding in *Cornejo-Barreto I* was disapproved of by *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9th Cir. 2004) ("*Cornejo-Barreto II*"). The en banc court, however, later vacated *Cornejo-Barreto II* and denied the government's request to vacate *Cornejo-Barreto I*. *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (en banc)."). In *Cornejo-Barreto I*, the Ninth Circuit Court of Appeals stated that the APA allows an individual who is facing extradition to petition under habeas corpus for review of the Secretary's determination to surrender him.

More specifically, the court in *Cornejo-Barreto I* found that the long-standing Rule of Non-Inquiry applied by federal courts to extradition decisions of the Secretary had been modified by the

FARR Act. *Cornejo-Barreto I*, 218 F.3d at 1015. Prior to the FARR Act, the Rule of Non-Inquiry barred all such review. *Id.* at 1010. However, after the implementation of the FARR Act, instead of refusing all review of the issue, the Ninth Circuit found that the FARR Act itself permitted judicial review of the Secretary's "implementation of the Torture Convention," although it might "limit judicial review of the regulations she promulgates." *Id.* at 1013. . . .

. . . The Ninth Circuit considered the fact that the APA "governs decision-making by most federal agencies." *Id.* at 1012. The APA "guarantee[s] . . . judicial review by federal courts of 'final agency action for which there is no other adequate remedy in a court.'" *Id.* at 1015; 5 U.S.C. § 704. Accordingly, the Ninth Circuit decided that the Secretary's determination as to extradition was a final agency action without other adequate remedy in a court.

* * * *

B. The Government's Position and Authority

The Government in its Motion to Dismiss argues that review under the APA is precluded by the language in the FARR Act, the history of the Rule of Non-Inquiry, and by several provisions of the APA itself. First, the Government argues that, as previously stated, the FARR Act provides that "notwithstanding any other provision of law," nothing in the statute is to be construed as providing jurisdiction to "consider or review claims raised under the Convention or this section, . . . or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to [the INA]." This language, according to the Government, evidences a clear congressional intent to preclude judicial review, in the FARR Act, of the Secretary's determination as to extradition.

Second, the Government notes that the APA was enacted in 1946. The Government then states that much of the case law establishing the Rule of Non-Inquiry was decided after that year. Therefore, the Government argues that courts should be skeptical of arguments for the "sudden discovery" of "new, revolutionary meaning in reading an old judiciary enactment." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 370, 79 S. Ct. 468, 479, 3 L. Ed. 2d 368 (1959).

Third, the Government states that several provisions of the APA itself foreclose judicial review of extradition decisions. . . .

* * * *

Further, the Government argues that the Secretary's decision is discretionary, as evidenced by the language of the CAT itself, which states that the obligation of the United States under the CAT is to refuse extradition if the "competent authorities," taking into account "all relevant considerations," determine that there are "substantial grounds" for believing that there is a danger of torture. . . .

Finally, the Government argues that requiring the Secretary to produce the administrative record of her extradition determination would undermine the point of the Rule of Non-Inquiry, severely damage the United States' foreign policy interests by potentially being seen as raising questions about the requesting country's institutions or commitment to the rule of law, and add further delays to an already lengthy extradition process. . . .

C. Discussion of Both Positions

. . . To the extent that the commentary in *Cornejo-Barreto I* is dicta, in that the Secretary in that case had not yet made a final decision as to extradition, this Court finds it to be persuasive, if non-binding, authority. The Court also notes that this decision in *Cornejo-Barreto I*—which was not vacated by the Ninth Circuit despite the Government's request to do so when the requesting county withdrew its extradition request, *see Cornejo-Barreto v. Siefert*, 389 F.3d 1307, 1307 (9th Cir. 2004) (en banc) . . .—is the closest applicable precedent to the instant matter and the only precedent from an appellate court concerning judicial review of an extradition decision decided after the passage of the FARR Act. No appellate court decision has specifically rejected the reasoning adopted by the Ninth Circuit in favor of the Government's position.

* * * *

To the extent that the Government makes arguments concerning the applicability of the APA that could be read as attacking the position of the Ninth Circuit in *Cornejo-Barreto I*, in that these arguments address language in the APA not specifically considered

in *Cornejo-Barreto I*, the Court finds these arguments without merit. For example, as previously stated, the Government has several arguments that concern the long-standing history of the APA and of the Rule of Non-Inquiry, and how that long history requires this Court to find that there is no review under the APA. However, the Court notes that there is no controversy that prior to the adoption of the FARR Act that judicial review of extradition decisions of the Secretary were precluded. *See Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). It is the history of the FARR Act, and not the history of the APA, that matters to this Court, and after the adoption of the FARR Act, APA review would appear to be available. The FARR Act states that "nothing in this section shall be construed as providing any court *jurisdiction* to consider or review claims raised under the Convention." FARR Act, § 2242(d) (emphasis added). It does not specifically preclude habeas jurisdiction. "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *INS v. St. Cyr*, 533 U.S. 289, 299, 121 S. Ct. 2271, 2278-79, 150 L. Ed. 2d 347 (2001).

The Court finds that *INS v. St. Cyr*, although not a case concerning extradition or the CAT, is instructive in this case. In *St. Cyr*, the U.S. Supreme Court considered the preclusive effect of statutory language in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") that said: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses. *Id*. at 311. The court then considered the fact that the phrases "judicial review" or "jurisdiction to review" and the phrase "habeas corpus" have "historically distinct meanings" particularly in the immigration and extradition context. *Id*. at 311; . . . Accordingly, the court found that Congress had not clearly barred jurisdiction based upon the habeas statute. *See St. Cyr*, 533 U.S. at 312-13, 121 S. Ct. at 2286 ("Neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.")

Subsequent to *St. Cyr*, Federal courts applied that decision to allow habeas claims by aliens fighting deportation where the Board

of Immigration Appeals ("BIA") had allegedly failed to properly review their CAT claims under the FARR Act.

In apparent response to the *St. Cyr* decision, and those decisions such as *Singh*, Congress in May 2005 enacted the REAL ID Act of 2005, which included a provision adding language to 8 U.S.C. § 1252 to bar "habeas review" and specifically limit habeas review of *orders of removal* under the CAT. See *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005); . . . 8 U.S.C. § 1252(a)(4) (2005) . . . Congress, despite having had the *Cornejo-Barreto I* decision in force in the Ninth Circuit since 2000, did not similarly amend the FARR Act to specifically preclude habeas review of extradition decisions.

After examining the arguments on both sides, the Court finds that Petitioner has the better of the argument, based upon the reasoning in *Cornejo-Barreto I*. . . . Accordingly, the Court will deny the Government's Motion to Dismiss. The Court, for purposes of *in camera* review, will require that the Government produce the administrative record considered by the Secretary with respect to the question of whether or not Petitioner would be subject to torture upon returning to Romania, so as to provide review as to whether the Secretary's determination was "arbitrary, capricious, or not in accordance with law." The Court stresses that this review will not consist of a *de novo* review of the record—the Court will not substitute its opinion for the Secretary's as to whether Petitioner would face torture upon return to Romania—but will merely determine whether the Secretary did, in fact, consider Petitioner's evidence, if only to subsequently and validly reject it. All documents produced by the Government may be filed under seal, so as to reduce any concerns as to foreign policy.

* * * *

U.S. brief on appeal to the Fourth Circuit:

* * * *

Our argument that the district court erred here is straightforward because we believe that the court asked the wrong question. The district court looked for unequivocal evidence that, when Congress passed Section 2242 of the FARR Act in 1998, it meant to and did preclude habeas jurisdiction of claims being raised under the Convention Against Torture, such as Mironescu's assertions here.

The proper question instead was whether, because Congress enacted the FARR Act with the Rule of Non-Inquiry as an essential part of the established extradition legal framework, did it intend to, and indeed actually legislated, an abrogation of that venerable doctrine. There is no evidence of such a legislative intent or action, and neither the district court nor Mironescu has pointed to any. Accordingly, the Rule of Non-Inquiry should have governed here, as it had governed challenges to extradition decisions for decades.

. . . [T]he Rule of Non-Inquiry establishes that claims about how a fugitive will be treated by the receiving country are properly made to the Secretary of State, and are not appropriate for judicial consideration. The Rule of Non-Inquiry therefore defeats Mironescu's claim for habeas relief unless he can demonstrate that the Torture Convention, the FARR Act, or the APA abrogates it. Actually, the opposite is true – there is no evidence that the President or Congress meant to, or did, bring about a radical change in extradition practice by making the Secretary's surrender decisions judicially reviewable in the FARR Act. Rather, the evidence points to the conclusion that the political branches intended to continue in force longstanding federal law and efficient extradition processes compatible with international law enforcement cooperation. Further, nothing in the APA changed to suddenly make extradition challenges reviewable under that statute when they had not been justiciable before. Thus, the district court erred by not dismissing this case, and by requiring the Secretary to submit the record behind her decision, which could include discussion of highly confidential dealings between the United States and Romania.

* * * *

In a subsequent letter to the court of appeals, submitted at the request of that court, the United States addressed the REAL ID Act that had been cited by the district court, *supra,* stating that "the government contends that the plain language of [8 U.S.C.] section 1252(a)(4) confirms the argument . . . that Mironescu's habeas petition seeking review of an extradition determination by the Secretary of State should be dismissed."

b. Hoxha v. Levi

On October 3, 2006, the Third Circuit Court of Appeals denied a habeas petition filed by a fugitive who argued (1) that the magistrate judge should have allowed certain recantation testimony, (2) that the extradition treaty between Albania and the United States is invalid, and (3) that he would face torture if returned to Albania for trial on murder charges. Hoxha v. Levi, 465 F.3d 554 (3d Cir. 2006), as amended October 5, 2006. Excerpts below address the court's conclusion that the extradition treaty was valid and that the rule of non-inquiry precludes judicial review of humanitarian claims in the context of analysis of whether a fugitive can be extradited (most footnotes omitted). The court also found that "[t]he Magistrate Judge . . . did not abuse his discretion in excluding the recantation evidence. There was competent evidence to support the Magistrate Judge's finding of probable cause, and we therefore decline to grant habeas relief on this basis."

* * * *

B. Validity of the Extradition Treaty

For an extradition to proceed, there must be a valid extradition treaty between the requesting country and the United States. *See Sidal* [*v. INS, 107 F.3d 191 (3d Cir. 1997)*], at 194. A petitioner facing extradition has standing to challenge the validity of the applicable extradition treaty. *United States ex rel. Saroop v. Garcia*, 36 V.I. 353, 109 F.3d 165, 168 (3d Cir. 1997). Petitioner here argues that the extradition treaty between Albania and the United States is invalid because the Kingdom of Albania, which was the signatory to the treaty in 1933, no longer exists, and in 1944 the successor government rejected all treaties entered into by the Kingdom of Albania. We review de novo the District Court's legal conclusion that the extradition treaty is currently in force. *See id.* at 167.

Whether a treaty remains valid following a change in the status of one of the signatories is a political question, and we therefore defer to the views of each nation's executive branch. *Id.* at 171.

The intent and conduct of the relevant governments is the critical factor. *Id*.; *see also Terlinden v. Ames*, 184 U.S. 270, 285, 22 S. Ct. 484, 46 L. Ed. 534 (1902) ("[O]n the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance.").

The U.S. government recognizes the extradition treaty between Albania and the United States as valid. A declaration submitted in this litigation from an Attorney Adviser in the Office of the Legal Adviser for the State Department states that the extradition treaty is "in full force and effect." A second submitted declaration from an Assistant Legal Adviser for Treaty Affairs in the Office of the Legal Advisor for the State Department confirms that view, and also notes that the treaty is named in the State Department's January 2004 "Treaties in Force" list, which includes treaties that have not expired and have not been otherwise terminated. *See Saroop*, 109 F.3d at 172 (noting, in considering the validity of an extradition treaty, that "the United States recorded the . . . treaty in the U.S. State Department's 'Treaties in Force' publication").

The Albanian government also recognizes the validity of the extradition treaty, as demonstrated by the fact that Albania requested Petitioner's extradition in this case pursuant to that treaty. Moreover, in 2003, the Albanian government ordered extradition of an individual on a charge of attempted homicide in response to a request from the United States under the extradition treaty. *See Saroop*, 109 F.3d at 172 (finding indicative of Trinidad and Tobago's recognition of the relevant treaty that Trinidad and Tobago "surrendered Saroop to the United States under a diplomatic request premised on the [treaty]"). Based on this evidence, we conclude that the extradition treaty between Albania and the United States remains valid, and we deny the habeas petition as to this claim.

C. Risk of Torture and Death Upon Extradition

Lastly, Petitioner asserts that he should be granted habeas relief because he will be tortured and may be killed by the Albanian authorities if he is extradited. Under the traditional doctrine of "non-inquiry," such humanitarian considerations are within the

purview of the executive branch and generally should not be addressed by the courts in deciding whether a petitioner is extraditable. . . . Once an individual is certified by a court as extraditable, the Secretary of State "exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations" in deciding whether extradition is appropriate. *Sidali*, 107 F.3d at 195 n.7 . . . Under the principle of non-inquiry, and in view of the evidence before it, the District Court correctly declined to consider Petitioner's humanitarian claims in the context of the extraditability analysis.[14]

Petitioner nonetheless argues that his humanitarian arguments are relevant under Section 2422 of the Foreign Affairs Reform and Restructuring Act ("FARR"), Pub. L. No. 105-277, 112 Stat. 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231), which implemented Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"). . . . Petitioner contends that the Secretary of State's enforcement of FARR is reviewable by the federal courts under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2000). The APA provides that court review is available as to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In response, the government argues that court review is unavailable because FARR did not abrogate the principle of non-inquiry, and that principle precludes review of the Secretary's actions. This debate is premature. The APA provides for review of "final agency action," but the Secretary of State has yet to take any action on Petitioner's case, and may ultimately decide not to extradite Petitioner. Thus, Petitioner's claim under the APA is not ripe for review, and we decline to consider it at this time.

[14] In *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), the Second Circuit suggested in dicta that an exception to the non-inquiry principle might exist in particularly extreme cases. *Id.* at 79 ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination" of the non-inquiry principle.). . . . The exception remains theoretical, however, because no federal court has applied it to grant habeas relief in an extradition case. Regardless of whether such an exception might be justified in some circumstances, we find that it does not apply here.

03-Cummins-Chap03.indd 158 10/22/07 11:33:53 PM

See Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted).

* * * *

3. Extradite or Prosecute

On November 3, 2006, Elizabeth Wilcox, Deputy Legal Advisor, U.S. Mission to the United Nations, addressed the UN General Assembly Sixth Committee on the Report of the International Law Commission ("ILC") on the Work of its 58th Session. Among other issues, in discussing the ILC's consideration of the topic of the obligation to extradite or prosecute, Ms. Wilcox stated:

> As reflected by the discussion in the Report, we recognize that there are a number of threshold issues that need be addressed in deciding whether and in what form to move forward with this topic. These include the extent to which customary international law in the area is sufficiently established to warrant progressive development and codification and whether an extradite or prosecute obligation is recognized outside the context of international conventions. We appreciate the preliminary work on this topic, and the difficult issues raised by the Commission during its discussions on how work on this topic should develop.
>
> We would echo the comments of many other states during the initial consideration on this topic that the Commission's work should focus on obligations under existing treaties. We also endorse the suggestion that the Commission first begin its work with a study of state practice to ascertain whether there is a basis for any obligation to extradite or prosecute under customary international law.

The full text of Ms. Wilcox's remarks is available at *www.state.gov/s/l/c8183.htm.*

4. Renditions

a. Remarks by Legal Adviser

In remarks in Rome at the Centro Studi Americani on September 11, 2006, marking the fifth anniversary of the attacks by al Qaida on the United States, Department of State Legal Adviser John B. Bellinger, III, discussed the U.S. response to those attacks. Among other issues, he addressed the role of renditions as excerpted below. The full text of Mr. Bellinger's remarks is available at *www.state.gov/s/l/c8183.htm. See also* U.S. responses to questions from the Committee Against Torture on renditions in Chapter 6.F.2.b.

* * * *

As nations committed to rule of law, we have an understandable desire to want to fit contemporary problems into a familiar international legal framework. But, as I've just explained, these new threats cannot easily be reconciled with existing international rules. To say that there is no clarity on what rules apply is not, as some in Europe may fear, an attempt by the United States "to get out of the rules." The United States remains firmly and unwaveringly committed to upholding international law. As the President has said, "America is a nation of laws." We will "continue to work with the international community to construct a common foundation to defend our nations and protect our freedoms."

But these were rules created for different times, and different facts require that they be adapted to the dangers of our time. I believe that a more pragmatic approach to reconciling rights and security issues—not an unyielding, dogmatic attitude that existing rules are all we need to protect both societal and individual rights—will produce the best results in our struggle against international terrorism.

Unfortunately, many international and non-governmental organizations have advanced inflexible, doctrinal answers to difficult legal questions that are in many cases simply incorrect legally and inconsistent with the obligations of government to protect the rights of society as a whole. For example, the Council of Europe's Venice Commission issued a report in March concluding in essence that Council of Europe members must not participate in renditions of terrorists because renditions violate international law. But this conclusion does not take into account that European countries have engaged in renditions in the past, and that these renditions have been upheld by European courts. The European Commission of Human Rights upheld the rendition by France of Carlos the Jackal. An outright ban on renditions would place a legal straightjacket on an important tool to combat terrorism. A more pragmatic approach would acknowledge the possibility of using renditions in rare cases, where the alternative is to let dangerous terrorists remain at large, while at the same time requiring that the practice meet important legal requirements, including the prohibition on torture. As Secretary Rice has made clear, "The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture."

Similarly, the Committee Against Torture, the UN Special Rapporteur on Torture and other human rights advocates have argued against relying on diplomatic assurances that returnees would not be tortured upon their return. Such an inflexible refusal to consider the weight of diplomatic assurances may have made sense when countries had only to deal with a very small number of individuals who faced risk of abuse if transferred to their countries of nationality. But today, States have found themselves unable to return hundreds of foreign nationals who are plotting terrorist attacks against their citizens. A less unyielding approach to diplomatic assurances may be appropriate.

* * * *

In a letter to the editor of the Wall Street Journal on July 5, 2006, Mr. Bellinger responded to comments by Council of Europe Secretary General Terry Davis, as set forth below.

Council of Europe Secretary General Terry Davis's June 27 editorial-page commentary "Unlawful Rendition" suggests that renditions of terrorist suspects conducted by the U.S. are fundamentally different from the 1994 "capture" in Sudan by French authorities of Illich Ramirez Sanchez, also known as Carlos the Jackal, which subsequently was upheld by the European Commission on Human Rights. The U.S. government is well aware that Carlos was rendered in order to face criminal prosecution in France. The U.S. itself has rendered a number of suspected terrorists to stand trial in the U.S., including Ramzi Yousef, who helped plan the first attack on the World Trade Center, and Mir Aimal Kansi, who gunned down several officials in front of CIA headquarters in Langley, Va.

But renditions of suspects to stand trial are not the only situations in which renditions are appropriate. Renditions are an important way to transfer terrorist suspects to their home countries, or to countries where they can be questioned, held or brought to justice for their suspected terrorist acts or other crimes. Sometimes such transfers cannot be done through extraditions or other "standard" processes, either because an extradition treaty is not in place or because the formal extradition process is not feasible in a particular case.

The Council of Europe's Venice Commission, which Swiss Senator Dick Marty's recent report cites as the "European point of view," asserts that there are only four legal ways to transfer a prisoner to foreign authorities: deportation, extradition, transit, and transfer of a sentenced person to serve that sentence in his country of origin. Thus, under the Venice guidelines, even the French rendition of Carlos would have been improper.

We disagree with the Venice Commission's conclusion. As the European Commission on Human Rights found, renditions are not per se unlawful, though important principles must be protected. Renditions should not be used to transfer terrorist suspects to face torture, and the U.S. does not transport anyone, and will not transport anyone, for this purpose. We believe, however, that the international community must continue to be able to use renditions not only to bring terrorists to justice but also to prevent terrorist suspects from remaining at large to plan future attacks.

03-Cummins-Chap03.indd 162 10/22/07 11:33:54 PM

b. Litigation in U.S. courts

On May 12, 2006, the U.S. District Court for the Eastern District of Virginia dismissed a claim by Khaled El-Masri "claim[ing] to be an innocent victim of the United States' 'extraordinary rendition' program and seek[ing] redress from the former Director of the Central Intelligence Agency (CIA), private corporations allegedly involved in the program, and unknown employees of both the CIA and the private corporations." *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006). The court granted the U.S. motion to dismiss on the ground that "maintenance of the suit would invariably lead to disclosure of its state secrets." Noting that the "state secrets privilege is an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs, and therefore belongs exclusively to the Executive Branch," the court concluded:

> . . . [T]he question is whether El-Masri's claims could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege.
>
> In the instant case, this question is easily answered in the negative. To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program. As noted above, any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument. . . . These threshold answers alone would reveal considerable detail about the CIA's highly classified overseas programs and operations.

El Masri appealed the dismissal of his suit. The case was pending at the end of 2006 following oral argument in November.

5. Cooperation with Eurojust in Criminal Enforcement Matters

On November 6, 2006, the United States signed an executive agreement with Eurojust, the purpose of which, as set forth

in Article 2 of the agreement, is "to enhance the co-operation between the United States and Eurojust in combating serious forms of transnational crime including terrorism." Eurojust is a European Union body established by a European Council decision of February 28, 2002, as amended by a Council decision of June 18, 2003. It consists of criminal investigators and prosecutors from all member states, and helps coordinate these countries' prosecutions relating to cross-border and transnational crime. Article 27 of the 2002 Council decision empowers Eurojust, in order to share personal data with third states on a systematic basis, to enter into cooperation agreements regulating such exchanges. The 2002 Council decision and the Rules of Procedure on the Processing and Protection of Personal Data, adopted by the college of Eurojust and approved by the European Council on February 24, 2005, set out data protection standards including rights of access, correction and deletion, time limits for storage, data security, and liability for unauthorized or incorrect processing. Where a third state is not bound by the privacy law standards applicable in Europe, Article 27(4) of the 2002 Council decision provides that Eurojust may share information with that state only if they have concluded an agreement ensuring "an adequate level of data protection."

The agreement creates an institutional relationship between the U.S. Department of Justice and Eurojust. Under Article 5, a DOJ liaison prosecutor is to be seconded to Eurojust's headquarters in The Hague, the Netherlands, in order to coordinate cross-border and transnational prosecutions with prosecutorial counterparts from EU member states. This relationship parallels that created at the police level with Europol, the European Police Office, also located in The Hague, an EU body which conducts law enforcement analysis on behalf of member states with respect to cross-border and transnational criminal matters. The United States previously concluded an executive agreement with Europol in 2001 on the exchange of strategic and technical data, and a supplemental agreement in 2002 on the exchange of personal data. *See Digest 2001* at 936-37 and *Digest 2002* at 80-85.

Articles 9 and 10 of the Eurojust agreement, set forth below, provide the permitted uses of information obtained under the agreement and general undertaking to protect personal data so obtained. Articles 11-17 provide further specific obligations in the handling of information so obtained. All obligations on the United States in the agreement are consistent with current U.S. law. The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*.

See also discussion of current and future cooperative agreements in several areas with European Union counterparts and the need to address privacy issues in them in a speech by State Department Legal Adviser John B. Bellinger, III, "Reflections on Transatlantic Approaches to International Law," delivered at the Duke Law School Center for International and Comparative Law, November 15, 2006, available at *www.state.gov/s/l/c8183.htm*.

Article 9
Privacy and Data Protection

1. The Parties recognize that the handling and processing of personal data they acquire from each other is of critical importance to preserving confidence in the implementation of this Agreement.
2. The Parties shall act in full accord with their respective laws concerning the processing of personal data exchanged pursuant to this Agreement and are committed to:
   a) processing personal data fairly;
   b) ensuring that the personal data provided is adequate and relevant in relation to the specific purpose of the request or transfer as defined in Article 8(2);
   c) retaining data only so long as necessary for the purpose for which the data were provided or further processed in accordance with this Agreement; and
   d) ensuring that possibly inaccurate data is timely brought to the attention of the receiving Party in order that appropriate corrective action is taken.

Article 10
Limitation on use to protect personal and other data

1. The Parties may use any evidence or information obtained under this Agreement:
   a) for the purpose of its criminal investigations and proceedings;
   b) for preventing an immediate and serious threat to its public security;
   c) in its non-criminal judicial or administrative proceedings directly related to investigations or proceedings set forth in subparagraph (a);
   d) for any other purpose, if the information or evidence has been made public within the framework of proceedings for which they were transmitted, or in any of the situations described in subparagraphs (a), (b), and (c); and
   e) for any other purpose, only with the prior consent of the Party which has transmitted the information.
2. a) This Article shall not prejudice the ability of the Party transmitting the information to impose additional conditions in a particular case where the particular request for assistance could not be complied with in the absence of such conditions. Where additional conditions have been imposed in accordance with this subparagraph, the transmitting Party may require the receiving Party to give information on the use made of the transferred evidence or information.
   b) Generic restrictions with respect to the legal standards of the receiving Party for processing personal data may not be imposed by the transmitting Party as a condition under subparagraph (a) to providing evidence or information.
3. Where, following disclosure to the receiving Party, the transmitting Party becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the Parties may consult to determine the extent to which the evidence or information can be protected.

4. The Parties shall not communicate any evidence or information provided under this Agreement to any third State or body without the consent of the Party which provided the information and without the appropriate safeguards.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On April 28, 2006, the Department of State released the 2005 Country Reports on Terrorism, submitted to Congress in compliance with 22 U.S.C. § 2656f, which requires the Department of State to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria of the Act. The report is available at *www.state.gov/s/ct/rls/crt/2005*. Chapter 1 of the report includes statutory excerpts relating to the terms used in the report and a discussion of the interpretation and application of those terms.

As explained in a fact sheet released March 21, 2006:

> Beginning with the report for 2005, Country Reports on Terrorism will also address terrorist sanctuaries and terrorist attempts to acquire weapons of mass destruction. It will also include statistical information provided by the National Counterterrorism Center (NCTC) on the number of individuals killed, injured, or kidnapped by terrorist groups.
>
> * * * *
>
> In July 2004, the 9/11 Commission recommended creation of a National Counterterrorism Center (NCTC) to provide an authoritative agency for all-source analysis of global terrorism. The President implemented the recommendation by executive order in August 2004, and the agency was created via the Intelligence Reform and Terrorism Prevention Act the following December.

See www.state.gov/s/ct/rls/fs/2006/63453.htm.

Annex A to the U.S. answers to written questions submitted to the Human Rights Committee in its review of U.S. compliance with the International Covenant on Civil and Political Rights, discussed in Chapter 6.A.4., sets forth selected definitions of "terrorism" and related terms from U.S. federal statutes and related authorities. *See www.usmission.ch/Press2006/ICCPRAdvanceQ&A.pdf.*

b. Access to airline passenger name record data

In 2004 the United States and the European Commission reached agreement on a plan to provide access to airline passenger name record ("PNR") data for flights originating within the European Union, recorded in three instruments: (1) Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection Regarding the Handling of Passenger Name Record Data ("Undertakings"); (2) European Commission Decision of May 17, 2004, on the adequate protection of personal data contained in the PNR of air passengers transferred to the United States' Bureau of Customs and Border Protection, 2004 O.J. (L183) 84 ("Adequacy Decision"); and (3) Agreement Between the United States of America and the European Community on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection ("Agreement"), signed May 28, 2004. *See Digest 2004* at 108-16.

On May 30, 2006, the European Court of Justice ruled that the EC lacked a basis under European law to enter into the agreement, and required its termination, effective September 30, 2006. *European Parliament v. Council of the European Union* and *European Parliament v. Commission of the European Communities.* Case C-317/04, *European Parliament v. Council of the European Union and Commission of the European Communities* (C-318/04), 2006 E.C.R. 1-04721. In a communication to the Council of the European Union, dated June 16,

2006, the European Commission explained:

> The Court stated that there is no competence for the Commission to take the [Adequacy] Decision, since the transfer of PNR data to [the U.S. Bureau of Customs and Border Protection] constitutes processing operations concerning public security and activities of the State in areas of criminal law, which pursuant to Article 3 of Directive 95/46/EC fall outside its scope and, therefore, cannot be based on Article 95 of the EC Treaty. The Court also annulled the Council decision approving the companion agreement to the Adequacy Decision because the two were extremely closely linked. Hence, according to the Court, the Agreement could not be based on Article 95 EC for the same reason.

In July 2006 the parties commenced negotiation of a replacement agreement, based on the EC's legal authority under Articles 24 and 38. As noted in a June 19, 2006, statement released by the European Commission, "Title VI [Treaty on European Union] (3rd Pillar) is the correct legal environment to conclude an International Agreement for matters dealing with public security and criminal law matters." *See* Doc. IP/06/800, available at *http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/800&format=HTML&aged=0&language=EN&guiLanguage=en.*

The resulting agreement, concluded on October 19, 2006, is effective through July 31, 2007; in the interim the EU and the United States will develop a long-term arrangement. The new agreement is substantially similar to the 2004 agreement. In addition, the EU agreed to a set of shared interpretations of 2004 Undertakings by DHS that, among other things, address DHS's electronic sharing of PNR data with U.S. law enforcement and intelligence agencies. The text of the agreement and an accompanying letter setting forth the interpretations are reprinted as part of a Federal Register notice dated December 19, 2006, 72 Fed. Reg. 348 (Jan. 4, 2007).

In the Federal Register notice, DHS updated a July 2004 Federal Register notice that set forth the Undertakings that were an element of the 2004 negotiations. Excerpts below

from the notice explain the role of the DHS Undertakings and the effect of the 2006 negotiations.

---

* * * *

On July 9, 2004, a Notice was published in the Federal Register (69 FR 41543; corrected at 69 FR 44082 on July 23, 2004), advising that the Department of Homeland Security (DHS), Customs and Border Protection (CBP), had issued a document on May 11, 2004 (referred to as the "Undertakings") containing representations regarding the manner in which CBP would handle certain Passenger Name Record (PNR) data relating to flights between the United States and European Union (EU) member states. When they were issued, these Undertakings were understood to provide the foundation for the European Community (EC) to enter into an agreement with the United States that permitted the transfer of PNR data to CBP consistent with applicable EC law. However, through a diplomatic note presented on July 3, 2006, the EC terminated the agreement as of September 30, 2006, as a consequence of the determination of the European Court of Justice that the agreement had been concluded on an inapplicable basis under European Union law.

On October 19, 2006, the United States and the EU concluded an agreement to last until July 31, 2007. This agreement was accompanied by a letter of the United States updating and adjusting the Undertakings to reflect changes in the law and circumstances surrounding this data transfer. The letter was discussed extensively with the EU, and the EU has acknowledged it without objection. Copies of the agreement and letter are contained in this notice. All representations contained in the Undertakings, as published on July 9 and 23, 2004 are to be interpreted consistently with the October 19, 2006 agreement and its accompanying letter. The letter reflects changes in U.S. law and experience since the Undertakings were issued and is consistent with existing relevant provisions of U.S. law.

* * * *

The letter accompanying the agreement and reprinted in the Federal Register included the following language on sharing

and disclosure of PNR, reflecting changes in U.S. law since the Undertakings of 2004.

* * * *

This letter is intended to set forth our understandings with regard to the interpretation of a number of provisions of the Passenger Name Record (PNR) Undertakings issued on May 11, 2004 by the Department of Homeland Security. . . .

Sharing and Disclosure of PNR

The Intelligence Reform and Terrorism Prevention Act of 2004 required the President to establish an Information Sharing Environment "that facilitates the sharing of terrorism information." Following this enactment, on October 25, 2005 the President issued Executive Order 13388, directing that DHS and other agencies "promptly give access to * * * terrorism information to the head of each other agency that has counterterrorism functions" and establishing a mechanism for implementing the Information Sharing Environment.

Pursuant to Paragraph 35 of the Undertakings (which states that "No statement in these Undertakings shall impede the use or disclosure of PNR data in any criminal judicial proceedings or as otherwise required by law" and allows DHS to "advise the European Commission regarding the passage of any U.S. legislation which materially affects the statements made in these Undertakings"), the U.S. has now advised the EU that the implementation of the Information Sharing Environment required by the Act and the Executive Order described above may be impeded by certain provisions of the Undertakings that restrict information sharing among U.S. agencies, particularly all or portions of paragraphs 17, 28, 29, 30, 31, and 32.

In light of these developments and in accordance with what follows, the Undertakings should be interpreted and applied so as to not impede the sharing of PNR data by DHS with other authorities of the U.S. government responsible for preventing or combating of terrorism and related crimes as set forth in Paragraph 3 of the Undertakings.

DHS will therefore facilitate the disclosure (without providing unconditional direct electronic access) of PNR data to U.S. government authorities exercising a counter-terrorism function that need PNR for the purpose of preventing or combating terrorism and related crimes in cases (including threats, flights, individuals, and routes of concern) that they are examining or investigating. DHS will ensure that such authorities respect comparable standards of data protection to that applicable to DHS, in particular in relation to purpose limitation, data retention, further disclosure, awareness and training, security standards and sanctions for abuse, and procedures for information, complaints and rectification. Prior to commencing facilitated disclosure, each receiving authority will confirm in writing to DHS that it respects those standards. DHS will inform the EU in writing of the implementation of such facilitated disclosure and respect for the applicable standards before the expiration of the Agreement.

* * * *

c. Countries not fully cooperating with U.S. antiterrorism efforts

On May 8, 2006, Secretary of State Condoleezza Rice determined and certified under § 40A of the Arms Export Control Act, 22 U.S.C. § 2781, and Executive Order 11958, as amended, that Cuba, Iran, North Korea, Syria, and Venezuela "are not cooperating fully with United States antiterrorism efforts." Public Notice 5411, 71 Fed. Reg. 28,897 (May 18, 2006). The notice stated further:

> I hereby notify that the decision not to include Libya on the list of countries not cooperating fully with U.S. antiterrorism efforts comes as the result of a comprehensive review of Libya's record of support for terrorism over the last three years. Libya has taken significant and meaningful steps during this time to repudiate its past support for terrorism and to cooperate with the United States in our antiterrorism efforts.

d. State sponsors of terrorism

(1) Designations and rescission

On May 12, 2006, President Bush issued Presidential Determination No. 2006-14, "Certification on Rescission of Libya's Designation as a State Sponsor of Terrorism in a memorandum for the Secretary of State," set forth below. 71 Fed. Reg. 31,909 (June 1, 2006), which includes the accompanying memorandum of justification. With the rescission of Libya's designation, only five countries are currently designated as state sponsors of terrorism: Cuba, Iran, North Korea, Sudan and Syria.

Pursuant to the Constitution and laws of the United States, including section 301 of title 3, United States Code, and consistent with section 6(j)(4)(B) of the Export Administration Act of 1979, Public Law 96-72, as amended (50 U.S.C. App. 2405(j)), and as continued in effect by Executive Order 13222 of August 17, 2001, I hereby certify, with respect to the rescission of the determination of December 29, 1979, regarding Libya, that:

(i) the Government of Libya has not provided any support for international terrorism during the preceding 6-month period, and
(ii) the Government of Libya has provided assurances that it will not support acts of international terrorism in the future.

This certification shall also satisfy the provisions of section 620A(c)(2) of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (22 U.S.C. 2371(c)), and section 40(f)(1)(B) of the Arms Export Control Act, Public Law 90-629, as amended (22 U.S.C. 2780(f)).

* * * *

A Department of State fact sheet summarized the history of Libya's designation as a state sponsor and subsequent

developments, as set forth below. The fact sheet is available at *www.state.gov/r/pa/prs/ps/2006/66244.htm*.

Countries whose governments the U.S. has determined have repeatedly provided support for acts of international terrorism are designated as state sponsors of terrorism under provisions in the Foreign Assistance Act, Arms Export Control Act, and Export Administration Act. The Secretary of State can rescind Libya's designation as a state sponsor, if the President submits a report to Congress at least 45 days before the proposed rescission. The report needs to justify the rescission and certify that the government of Libya has not provided any support for international terrorism during the last six months and has provided assurances that it will not support future acts of international terrorism. After careful review, the President submitted a report on Libya to Congress on May 15, 2006. In conjunction, Secretary of State Condoleezza Rice announced her intention to rescind Libya's designation as a state sponsor of terrorism after the 45-day period expires.

Libya was designated a state sponsor of terrorism in 1979. Relations deteriorated further during the 1980s, particularly in the aftermath of Libya's role in the destruction of Pan Am flight 103 over Lockerbie, Scotland in December 1988, killing 270 people. In 1999, Libya began seriously to address our terrorism concerns and began the process of fully meeting the requirements to distance itself from terrorism by transferring the suspects in the Pan Am 103 case for trial by a Scottish court sitting in the Netherlands. Beginning in 2001, the United States and the United Kingdom initiated three-way direct talks with Libyan representatives to secure Libya's compliance with the remaining international terrorism requirements. Based upon these discussions, on August 15, 2003, Libya sent a letter to the United Nations Security Council confirming its commitment "not to engage in, attempt, or participate in any way whatever in the organization, financing or commission of terrorist acts or to incite the commission of terrorist acts or support them directly or indirectly" and to "cooperate in the international fight against terrorism." Libya also accepted responsibility for the

actions of its officials in the Pan Am 103 incident, agreeing to pay over $2 billion in compensation to the families of the victims of Pan Am 103 and pledged to cooperate in the investigation.

On December 19, 2003, after intense discussions with the United States and the United Kingdom, Libya announced its decision to abandon its programs to develop weapons of mass destruction (WMD) and MTCR Category I missile delivery systems. President Bush responded that the United States would reciprocate Libya's good faith in implementing this change of policy. At the same time, Libya moved forward in implementing its pledge to cooperate in the fight against international terrorism. Since September 11, 2001, Libya has provided excellent cooperation to the United States and other members of the international community in response to the new global threats we face. Based on this cooperation, Secretary Rice also announced on May 15, 2006, that, for the first time, Libya will not be certified this year as a country not cooperating fully with U.S. antiterrorism efforts.

The United States has responded to Libya's actions through a careful step-by-step process designed to acknowledge Libya's progress, but still allow review at each stage. Libya has responded in good faith not only in the area of international terrorism but also in the related field of weapons of mass destruction. Libya is an important model to point to as we press for changes in policy by other countries (such as Iran, North Korea, and others), changes that are vital to U.S. national security interests and to international peace and security.

The memorandum of justification accompanying the rescission provides greater detail on Libya's involvement with and renunciation of terrorism. *See also Cumulative Digest 1991-1999* at 457-80 and 1921-24, *Digest 2003* at 160-67 and 1068-69, and *Digest 2004* at 927-31, 1158-63. The memorandum concluded as excerpted below.

* * * *

Libya, of course, had a demonstrated record of supporting certain terrorist organizations in the 1970's and 1980's, so in making the statutory certifications it was prudent to review Libya's

policies not only over the past 6 months but over the last several years to be sure of a definitive change. The result of that review is favorable—for a number of years, Libya has ceased direct support for acts of terrorism and taken concrete steps to distance itself from terrorist organizations with which it used to maintain active ties. With respect to the past 6 months, Libya has continued to cooperate with the United States and the international community in the war on terrorism. Libya has worked closely with international partners to curtail the terrorism-related activities of the LIFG and other al-Qaida-associated groups and has continued to cooperate with the international community to help ensure that its territory is not used as a safehaven for international terrorists. Libya has continued to take steps to distance itself from past terrorist activities, and over the past 6 months there have been no allegations of Tripoli providing support for groups planning to engage in terrorist attacks.

* * * *

In conclusion, the designation of Libya in 1979 as a state sponsor of terrorism was designed to serve several purposes: to put pressure on Libya to change its policies, to provide it with an incentive to do so, and to act not as a permanent designation, but to respond to concrete behavior, both good and bad. It is now 27 years since Libya was designated, and seven years since it began seriously to address our terrorism concerns. After careful review, the President has decided that the record supports the statutorily required certifications that Libya has not provided any support for acts of international terrorism during the preceding six month period and has provided assurances that it will not provide support for acts of international terrorism in the future. This will permit the Secretary of State to rescind Libya's designation following the 45-day Congressional review period. Rescission in this case will strongly support the objectives of the state sponsor legislation. Libya has responded in good faith not only in the area of international terrorism but also in the related field of weapons of mass destruction. Libya will become a useful model to point to as we press for changes in policy by other countries—Iran, North Korea, and

others—vital to United States national security interests and international peace and security.

(2) Implementing regulations

The Department of Commerce Bureau of Industry and Security ("BIS") issued an interim final rule with request for comments to implement in the Export Administration Regulations ("EAR") the rescission of Libya's designation as a state sponsor of terrorism in 2006. 71 Fed. Reg. 51,714 (Aug. 31, 2006). The rule, effective August 31, 2006, also made revisions to implement the rescission of Iraq's designation as a state sponsor of terrorism in 2004. Excerpts below from the Federal Register describe the actions taken.

---

* * * *

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to implement the June 30, 2006 rescission of Libya's designation as a state sponsor of terrorism. . . . To implement the rescission, BIS amends the EAR by removing Libya from the list of terrorist supporting countries in Country Group E:1, and by making other conforming amendments and related revisions throughout the EAR. In particular, Libya is added to Country Group D:1 and remains in Country Groups D:2, D:3, and D:4.

This rule also revises the EAR to reflect the fact that in October 2004 the United States rescinded Iraq's designation as a state sponsor of terrorism. As a result of the rescission of this designation, BIS may no longer control for anti-terrorism (AT) reasons items covered by eight export control classification numbers (ECCNs) for which BIS previously required a license for export or reexport to Iraq, or for transfer within Iraq. Note that BIS now controls these items for regional stability (RS) reasons and continues to require a license for their export or reexport to Iraq, or transfer within Iraq. This rule also amends the EAR to delete all references to Iraq's status as a Designated State Sponsor of Terrorism.

* * * *

Libya Overview

The new Libya export licensing policy significantly reduces the level of U.S. Government controls over commercial exports to Libya, which is consistent with Libya's removal from the list of Designated State Sponsors of Terrorism. BIS, however, retains restrictions on the export of multilaterally-controlled items and other sensitive items to Libya.

Revised License Requirements for Exports and Reexports to Libya Items for Which Export License Requirements are Generally Lifted

Under this rule, items subject to the EAR but not listed on the Commerce Control List (15 CFR part 774) (CCL) (i.e., EAR99 items) will generally not be subject to license requirements for export or reexport to Libya except pursuant to the end-user and end-use controls set forth in part 744 of the EAR. In addition, items controlled only for anti-terrorism (AT) reasons on the CCL will no longer be subject to a licensing requirement for export or reexport to Libya, except for the end-use and end-user requirements noted above.

Also, the de minimis rules applicable to Libya are amended to reflect Libya's removal from Country Group E:1. Reexports of items to Libya from abroad are subject to the EAR only when U.S.-origin controlled content in such items exceeds 25% instead of the 10% that applies to Country Group E:1 countries.

Items for Which Export License Requirements Will Be Retained

This rule retains license requirements for the export or reexport to Libya of items on the multilateral export control regime lists (the Wassenaar Arrangement, the Nuclear Suppliers' Group, the Australia Group and the Missile Technology Control Regime) and items controlled for Crime Control (CC) or Regional Stability (RS) reasons. These license requirements are set forth in part 742 of the EAR and are reflected in the relevant columns of the Country Chart in Supplement No. 1 to part 738 of the EAR. Certain categories of items that are controlled for reasons not included on the Country Chart (e.g., encryption (EI), short supply (SS), and Chemical Weapons (CW)) also require a license for export or reexport to Libya.

Revised Licensing Policy for Libya

BIS will review license applications for exports or reexports to Libya on a case-by-case basis pursuant to applicable licensing policies set forth in parts 742, 744, or elsewhere in the EAR.

* * * *

As a result of the rescission of Libya's designation as a state sponsor of terrorism, Libya will also be an eligible destination for special comprehensive licenses as described in part 752 of the EAR.

* * * *

Overview of Iraq Revisions

This rule also makes revisions to the EAR to reflect the October 2004 rescission of Iraq's designation as a state sponsor of terrorism. Under the terms of the revisions, items covered by eight export control classification numbers (ECCNs) which previously required a license for export or reexport to Iraq, or transfer within Iraq, for anti-terrorism (AT) reasons now require a license for export or reexport to Iraq, or transfer within Iraq, for regional stability (RS) reasons. This change affects the following ECCNs: 0B999 (Specific processing equipment such as hot cells and glove boxes suitable for use with radioactive materials), 0D999 (Specific software for neutronic calculations, radiation transport calculations and hydrodynamic calculations/modeling), 1B999 (Specific processing equipment such as electrolytic cells for fluorine production and particle accelerators), 1C992 (Commercial charges containing energetic materials, n.e.s.), 1C995 (Certain mixtures and testing kits), 1C997 (Ammonium Nitrate), 1C999 (Specific Materials, n.e.s.) and 6A992 (Optical Sensors, not controlled by 6A002). BIS has retained a licensing requirement for these items for RS reasons to reflect the U.S. Government's position that they could contribute to military capabilities within Iraq and in the region in a manner destabilizing to the region and contrary to the foreign policy interests of the United States. This rule also amends the EAR to delete all references to Iraq's former status as a Designated State Sponsor of Terrorism.

This action is taken after consultation with the Secretary of State. This rule imposes new export controls for foreign policy reasons. Consistent with section 6 of the Export Administration

Act of 1979, as amended, 50 U.S.C. app. §§ 2401-2420 (2000) (the Act), a foreign policy report was submitted to Congress on August 17, 2006, notifying Congress of the imposition of new controls.

* * * *

e. U.S. actions against support for terrorists

(1) Litigation

(i) United States v. Afshari

On April 28, 2006, the Ninth Circuit denied a petition for rehearing *en banc* from an October 20, 2005, panel decision upholding the constitutionality of the foreign terrorist organization designation statute, 8 U.S.C. § 1189. *United States v. Afshari*, 446 F.3d 915 (9th Cir. 2006), *cert. denied sub nom. Rahmani v. U.S.*, 127 S. Ct. 930 (2007). In so doing, the Ninth Circuit overturned a district court decision dismissing a material support indictment under 18 U.S.C. § 2339B(a)(1) on the ground that the designation statute was unconstitutional. The United States filed a brief in opposition to the petition for certiorari in the Supreme Court in November 2006, arguing that "[t]he decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals . . . , the case is in an interlocutory posture, such that further proceedings on remand may moot the constitutional claims presented here, [and] [f]urther review is not warranted." The U.S. brief is available at *www.usdoj.gov/osg/briefs/2006/oresponses/2006-0241.resp.html*.

(ii) Humanitarian Law Project v. Gonzales

In April 2006, the United States filed a cross-appeal brief in *Humanitarian Law Project v. Gonzales*, Nos. 05-56753, 05-56846, before the Ninth Circuit. The lower court opinion is discussed in *Digest 2005* at 124-28. The U.S. brief argued that the statutory ban on knowing provision of "training," "expert advice or assistance," or "service" to entities designated as foreign

terrorist organizations is not unconstitutional, as the terms are not impermissibly vague. An excerpt summarizing the U.S. argument is below. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

To satisfy due process, a criminal prohibition such as the material support statute must be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). To satisfy this requirement, the Government need not define an offense with "mathematical certainty," *Grayned*, 408 U.S. at 110, but must provide only "relatively clear guidelines as to prohibited conduct," *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

The district court held that the terms "training," "expert advice or assistance," and "service" are unconstitutionally vague. The court erred, however, because each term is sufficiently well-defined, and their respective meanings should be recognizable by a person of ordinary intelligence. And, contrary to the district court's conclusion, in light of the Terrorism Prevention Act's statutory amendments, each term is confined to direct support knowingly given to a foreign terrorist organization, thus clearly demarcating between what the statute covers (impermissible direct aid to terrorists) and what it does not (independent advocacy). Accordingly, none of the challenged terms is vague.

The district court thought the challenged terms were vague because, in its view, it is unclear whether those terms cover only direct support of foreign terrorist organizations or also extend to independent advocacy that indirectly aids such groups. . . . For the reasons set forth below, we think the statute clearly reaches only direct, as opposed to independent, support. But even if that were unclear, the issue identified by the district court would be no more than an ordinary instance of statutory ambiguity that must be resolved by a court; ambiguity does not render a statute void for vagueness. Were it otherwise, every ambiguous statute whose

meaning is resolved under the second step of *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), would necessarily be void for vagueness. That, obviously, is not the law.

More fundamentally, the district court erred by confusing vagueness with overbreadth. Specifically, the district court held that the challenged terms are vague not because their meaning is unclear, but because the terms might apply to prohibit constitutionally protected conduct. . . . Whether a statute "punishes a 'substantial' amount of protected free speech," however, is a question of overbreadth, *Virginia v. Hicks*, 539 U.S. 113, 118 (2003), not vagueness, as the district court believed.

Nor, for that matter, are the terms here overbroad, because they do not prohibit a substantial amount of protected speech, judged in either absolute terms or in relation to the statute's plainly legitimate sweep. *See Hicks*, 539 U.S. at 119. Rather, the statute predominantly targets activity such as teaching terrorists how to use a weapon or build a bomb, how to evade surveillance, or how to launder money – none of which is constitutionally protected activity. Indeed, the material support statute does not prohibit any protected speech at all. As discussed below, the statute only prohibits support given directly to a designated foreign terrorist organization, and that support can be prohibited consistent with the Constitution because there is no right to provide aid to foreign terrorist groups, even where that aid takes the form of both words and conduct. *See Humanitarian Law Project* [*v. Reno*, 205 F.3d 1130 (9th Cir. 2000)], 205 F.3d at 1133 ("there is no constitutional right to facilitate terrorism by giving terrorists" support "with which to carry out their grisly missions").

As a result of the district court's errors, it enjoined the Government from enforcing the purportedly vague provisions against plaintiffs with respect to the terrorist groups at issue. That injunction, however, not only permits plaintiffs to provide the PKK and LTTE with training and expert advice on how to petition the United Nations, but also permits plaintiffs to provide any type of training or expert advice to those groups, including, for example, training or expert advice on how to build a bomb. This Court should reverse and vacate that erroneous injunction.

* * * *

(iii) Humanitarian Law Project v. U.S. Department of the Treasury

On November 21, 2006, the U.S. District Court for the Central District of California issued an order granting in part motions for summary judgment in a case challenging restrictions on support to two entities designated as specially designated global terrorist groups. *Humanitarian Law Project v. Dep't of Treasury*, 463 F. Supp. 2d 1049 (C.D. Cal. 2006). Plaintiffs – humanitarian organizations and U.S. citizens seeking to support certain lawful and non-violent activities of the Partiya Karkeran Kurdistan and Liberation Tigers of Tamil Eelam– brought the suit to challenge five aspects of Executive Order 13224 and its implementing regulations. As described by the court, plaintiffs claimed that: (1) the Executive Order's ("EO") ban on "services" to a specially designated global terrorist group ("SDGT") is unconstitutionally vague because it "fails to adequately notify the public, and Plaintiffs specifically, of the conduct to which the ban applies"; (2) the EO's regulations "are vague because they contain no definition of the term 'specially designated terrorist group'"; (3) the President's designation authority is unconstitutionally vague; (4) the "EO's ban on being 'otherwise associated with' a terrorist group is vague and overbroad, as it punishes individuals and groups for exercising their First Amendment right to freedom of association"; and (5) the licensing provision in the regulations "violates the First and Fifth Amendments because it contains no substantive or procedural safeguards for determining which individuals or groups qualify for a license." The U.S. government defendants argued that plaintiffs lacked standing to challenge the President's designation authority, the "otherwise associated with" provision of the EO, and the licensing provision in the regulations. Defendants also moved for summary judgment. In its November 21 order, the court held as follows:

> 1. The Court finds that Plaintiffs have standing to challenge the President's authority to designate SDGTs under Executive Order 13224. The Court therefore DENIES Defendants' Motion to Dismiss on this ground.

2. The Court finds that the President's authority to designate SDGTs under Executive Order 13224 is unconstitutionally vague on its face. The Court therefore GRANTS Plaintiffs' Motion for Summary Judgment on this ground.

3. The Court finds that Plaintiffs have standing to bring their First Amendment challenge to Executive Order 13224, § 1(d)(ii), the "otherwise associated with" provision. The Court therefore DENIES Defendants' Motion to Dismiss on this ground.

4. The Court finds that Executive Order 13224, § 1(d)(ii), the "otherwise associated with" provision, is unconstitutionally vague on its face and overbroad. The Court therefore GRANTS Plaintiffs' Motion for Summary Judgment on this ground.

5. In all other respects, Plaintiffs' Motion for Summary Judgment is DENIED, and Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment is GRANTED. Accordingly, Defendants, their officers, agents, employees, and successors are ENJOINED from (1) designating any of the Plaintiffs as SDGTs pursuant to the President's authority under Executive Order 13224 to make such designations; and (2) enforcing Executive Order 13224, § 1(d)(ii), against any of the Plaintiffs by blocking their assets or subjecting them to designation as SDGTs for being "otherwise associated with" the PKK or the LTTE. The Court declines to grant a nationwide injunction.

Excerpts below from the court's opinion set forth its analysis of constitutional challenges to the Executive Order's ban on "services," the term "specially designated terrorist group," the President's designation authority, and the term "otherwise associated with" a terrorist group. The court did not reach the merits of the challenge to the regulations' licensing provision because it found that the plaintiffs lacked standing to challenge the licensing scheme. (Footnotes are omitted).

* * * *

A. Plaintiffs' Challenge to the EO's Ban on "Services"

* * * *

Here, the EO's ban on "services" is not vague as applied to Plaintiffs' proposed conduct. On the contrary, it unquestionably applies to each of the activities in which Plaintiffs seek to engage. First, the Regulations' prohibition on providing "educational" and "legal" "services" unequivocally prohibits Plaintiffs from providing training in human rights advocacy and peacemaking negotiations, as well as providing legal services in setting up institutions to provide humanitarian aid and in negotiating a peace agreement. Second, while not covered by the Regulations' definition of "services," the EO itself explicitly bars Plaintiffs from providing humanitarian aid to the PKK and LTTE. *See* EO § 4. Third, to the extent that the Regulations' definition of "services" leaves any ambiguity about whether Plaintiffs may provide engineering services and technological support to help rebuild the infrastructure in tsunami-afflicted areas, the EO's ban on providing "technological support" eliminates any such ambiguity. EO § 1(d)(i); *see Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1048 (9th Cir. 2005) (finding no ambiguity as to whether statutory provision governing solicitations of charitable contributions applied to panhandlers or church bake sales because other provisions within statute clarified ambiguity).

In contrast, the EO's ban on "services" does not apply to Plaintiffs' efforts to independently support the PKK or LTTE in the political process. Nothing in the EO Regulations' definition of "services" prohibits independent political activity; instead, the Regulations prohibit Plaintiffs from providing "services" to an SDGT. This prohibition would not, for example, prohibit Plaintiffs from vocally supporting the activities of the PKK or the LTTE. . . .

* * * *

Moreover, contrary to Plaintiffs' argument, the fact that the Court previously found the [Antiterrorism and Effective Death Penalty Act's] AEDPA's use of the word "service" vague as applied does not dictate that the Court must likewise find the EO's use of the word "services" vague in this case. On the contrary, Plaintiffs'

argument overlooks the differences between the word "service" in the AEDPA and the word "services" in the EO. The AEDPA's ban on "service" was not as clear as that in the EO with respect to Plaintiffs' proposed activities. Indeed, to the extent that the AEDPA offered illustrations of what would constitute "service," those illustrations included "training" and "expert advice or assistance," two terms that the Court had already concluded were impermissibly vague. Given the vagueness of these words, the resulting illustrations of "service" provided little, if any, guidance for Plaintiffs to determine whether the AEDPA prohibited them from "teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations." Humanitarian Law Project, 380 F. Supp. 2d at 1150.

Additionally, even if the AEDPA's definition of "service" contained only clear terms, its application was questionable as to Plaintiffs' proposed activities. The AEDPA contained no reference to "legal" or "educational" services in its list of activities falling within the statute's prohibition on "service." In contrast, the EO's definition of "services" includes these terms and, as such, leaves no doubt as to whether Plaintiffs' proposed activities would be prohibited. Indeed, such activities would most definitely constitute "legal" or "educational" "services," which the EO's Regulations unequivocally prohibit. This difference renders Plaintiffs' reliance on the Court's past Order untenable.

* * * *

. . . [T]he EO's ban on "services" is not vague on its face. First, Plaintiffs' allegations aside, the EO's ban on "services" does not give "unfettered authority" to designate a person or group as an SDGT. While the Regulations' definition of "services" may not be exact, it does not permit subjective standards of enforcement. . . . Instead, the word "services" is, by and large, a word of common understanding and one that could not be used for selective or subjective enforcement. Although instances may arise where it is unclear whether the EO prohibits some conduct, this does not mean that the EO provides unfettered discretion as to what constitutes "services."

* * * *

B. Plaintiffs' Vagueness Challenge to the Term "Specially Designated Terrorist Group"

* * * *

Plaintiffs' challenge to the EO's use of the term "specially designated terrorist group" lacks merit. First, contrary to Plaintiffs' argument, the Regulations define the term "specially designated terrorist group." Specifically, the Regulations define "specially designated terrorist group" as "any foreign person or person listed in the Annex or designated pursuant to Executive Order 13224 of September 23, 2001." 31 C.F.R. § 594.310. Moreover, even if it lacked a definition, the term "specially designated terrorist group" is nothing more than shorthand for groups or individuals designated under the EO, as opposed to groups designated under other executive orders. . . . Thus, Plaintiffs' allegations aside, this term is not vague.

* * * *

Second, Plaintiffs' argument overlooks the limited circumstances under which the IEEPA affords the Executive any power. Indeed, before the Executive may take any action under the IEEPA, he or she must first declare a national emergency. And furthermore, any action the Executive takes under the IEEPA's grant of authority must relate to that identified emergency. This, coupled with the limited circumstances described below under which a person may be designated under the EO, ensures that the designating authorities are not afforded "unfettered discretion" in designating groups or individuals as SDGTs.

Third, the EO provides adequate criteria for designating an individual or group as an SDGT. *See Islamic Am. Relief Agency v. Unidentified Agents*, 394 F. Supp. 2d 34, 46 (D.D.C. 2005) (finding that EO "clearly designates procedures for designating organizations as SDGTs"). In particular, the EO requires the secretary of the treasury to make specific findings before designating any group or individual as an SDGT. EO § 1(b)-(d)(ii). . . .

* * * *

Finally, although Plaintiffs insist otherwise, the EO and its Regulations provide a procedure for designated groups to challenge any designation made under the EO and its Regulations.

Specifically, a designated person or group may "seek administrative reconsideration" of the designation under 31 C.F.R. § 501.807. Furthermore, a designated person or group may also "propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation." 31 C.F.R. § 501.807(a). Additionally, upon receiving a request for reconsideration, the Office of Foreign Assets Control must review the request and "provide a written decision to the blocked person. . . ." *Id.* at § 501.807(d). These procedures provide sufficient safeguards to which aggrieved parties may avail themselves.

Accordingly, Plaintiffs' challenges to the term "specially designated terrorist group" and to the EO's designation procedure both fail.

B. [sic] Plaintiffs' Vagueness Challenge to the President's Designation Authority

* * * *

Plaintiffs present a strong facial challenge to the President's designation authority. Indeed, the EO provides no explanation of the basis upon which these twenty-seven groups and individuals were designated, and references no findings akin to those the secretary of treasury is required to make.

In addition, the procedures for challenging designations made by the secretary of treasury are not clearly available with regard to designations made by the President. In short, the criteria and processes discussed above that apply to the delegated designation authority, and that help ensure its constitutionality, do not appear to apply to the President's designation authority. Rather, the President's designation authority is subject only to his unfettered discretion. Finally, nothing in the EO appears to divest the President of his authority to make additional designations.

The Government has offered no argument demonstrating how the President's designation authority is constrained in any manner. Rather, the Government contends only that Plaintiffs' fear of punishment derives from their association with groups that were

designated not by the President, but by the secretary of state pursuant to delegated authority. However, this attempt to challenge Plaintiffs' standing fails to meet Plaintiffs' argument, which is that they may be subject to designation under the President's authority for any reason, including for associating with the PKK and the LTTE, for associating with anyone listed in the Annex, or for no reason. Because the President has used his designation authority in the past, and because there is no apparent limit on his ability to continue to do so, Plaintiffs have standing to bring their constitutional challenge for the same reasons as discussed in section C, infra.

Accordingly, the President's designation authority is unconstitutionally vague.

C. Plaintiffs' Challenge to the EO's Ban on Being "Otherwise Associated With" an SDGT

* * * *

. . . [T]he Government made no attempt to defend the constitutionality of the provision. Rather, the Government's sole argument for denying Plaintiffs' challenge to this section is that Plaintiffs lack standing. Having rejected the Governments' standing argument, the Court finds that the prohibition on being "otherwise associated with" an SDGT on its face unconstitutionally intrudes upon activity protected by the First Amendment.

First, the term "otherwise associated" is not itself susceptible of a clear meaning. Nor does the provision mitigate the vagueness of the term by supplying any definition. Indeed, as Plaintiffs point out, the provision contains no definition of the term whatsoever. Accordingly, the provision lends itself to subjective interpretation. . . .

Second, and relatedly, unlike the term "services", discussed infra, the "otherwise associated with" provision contains no definable criteria for designating individuals and groups as SDGTs. Thus, the provision on its face gives the Government unfettered discretion in enforcing it.

Accordingly, the "otherwise associated with" provision is unconstitutionally vague on its face.

* * * *

Plaintiffs argue persuasively that the "otherwise associated with" provision is unconstitutionally overbroad because it punishes mere association with an SDGT. It is axiomatic that the Constitution forbids punishing a person for mere association. "[T]he First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed." *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995). "'[G]uilt by association alone' . . . is an impermissible basis upon which to deny First Amendment rights." *Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *see also United States v. Robel*, 389 U.S. 258, 264-65, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967) (finding that "guilt by association alone," even in the name of national defense, violates the First Amendment). Rather, the government must "establish [the individual's] knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy*, 408 U.S. at 186. Therefore, "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Id*. at 192.

Here, it is facially clear, and the Government offers no argument to the contrary, that the "otherwise associated with" provision imposes penalties for mere association with an SDGT. There is nothing in the provision purporting to limit its application only to those instances of association also involving activity, let alone activity that furthers or advances an organization's illegal goals.

The provision's overbreadth is also substantial. For example, to the extent to which the provision reaches activity, as opposed to mere association, that activity is likely also covered by other provisions of the EO, such as the provision banning "services." Thus, the potentially legitimate scope of the "otherwise associated with" provision is already captured in other provisions that are not unconstitutional. Relatedly, to the extent to which the scope of the "otherwise associated with" provision does not duplicate the scope of other provisions, it likely reaches only mere association. Indeed, the EO itself presents the "otherwise associated with" provision

as a catch-all, to reach conduct that is not specified in previous provisions.

Accordingly, the "otherwise associated with" provision is unconstitutionally overbroad.

* * * *

(iv) Kahane Chai v. Department of State

In October 2003 Secretary of State Colin Powell re-designated Kahane Chai as a Foreign Terrorist Organization ("FTO"), re-designated Kach as an alias of Kahane Chai and for the first time designated Kahane.org as an alias of Kahane Chai. Those designations were reaffirmed in 2004. In 2005 the three entities petitioned for revocation of the 2003 designations, claiming that they were made without substantial support in the administrative record and that the State Department denied them due process when it refused to provide the administrative record prior to the 2003 designations. The petition further alleged that it was a violation of the First Amendment to designate a website as an FTO. Finally, the petitioners argued that the designations of websites as FTOs constituted discrimination based on religion, as only websites of Jewish organizations were designated as FTOs. Kahane Chai has the stated purpose of restoring the biblical state of Israel.

The U.S. Court of Appeals for the D.C. Circuit denied the petition on October 17, 2006. *Kahane Chai v. Department of State*, 466 F.3d 125 (D.C. Cir. 2006). Excerpts from the decision follow.

---

* * * *

A. Statutory Claims

Our standard of review is deferential. Under the AEDPA (as amended by Pub. L. No. 104-208, § 356, 110 Stat. 3009, 3009-644 (1996)) we are to set aside the Secretary's designation of a FTO only if that designation was

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . or
(E) not in accord with the procedures required by law.

8 U.S.C. § 1189(c). Our review is to be "based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." *Id.* Moreover, we make no judgment as to the accuracy of the information in the record; "our only function is to decide if the Secretary, on the face of things, had enough information before [him] to come to the conclusion that the organizations were foreign and engaged in terrorism." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 337 U.S. App. D.C. 106, 182 F.3d 17, 25 (D.C. Cir. 1999) (*PMOI I*).

The petitioners challenge as a denial of due process the Secretary's use of classified information in designating them FTOs. We need not resolve that claim, however, for in this case we can uphold the designations based solely upon the unclassified portion of the administrative record. *See People's Mojahedin Org. of Iran v. Dep't of State*, 356 U.S. App. D.C. 101, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (*PMOI II*); *id.* at 1245 (Edwards, J., concurring).

1. Redesignation of Kahane Chai as a FTO

The petitioners assert the Secretary's finding Kahane Chai threatened an assassination is based upon a faulty interpretation of the record. In response, the Department notes the Secretary based his conclusion upon four documents. The first is a transcript of a July 1, 2002 radio broadcast by the Jerusalem Voice of Israel Network reporting that death threats had been made against Israeli police officers investigating the "Jewish terrorist squad case," an apparent reference to the attempted bombing by right-wing extremists of an Arab school for girls. An activist with ties to Kach was arrested in connection with the bombing. The second document is

an article in the November 3, 2003 newspaper Ma'ariv reporting that Kach activists had organized demonstrations near the house of "one of the heads" of the Jewish Affairs Division of the Shin Bet (General Security Service) to protest the conditions of the detained members of the "Jewish terrorist squad" accused of the attempted bombing. The protestors had sprayed graffiti spelling out the official's name (the publication of which was banned), and demanding he "stop abusing Jews." The official's wife is quoted as saying, "Our family is facing harassment and threats." The third document is a May 28, 2003 summary by the Foreign Broadcast Information Service (FBIS) of news reports indicating right-wing activists, including members of Kach, had launched a "personal incitement campaign" against then-Prime Minister Sharon. The fourth document summarizes a July 2003 radio broadcast by the Jerusalem Voice of Israel Network reporting that "Shin Bet Director Dichter said . . . the threat to the life of Prime Minister Sharon had grown" and "there was a threat from . . . several dozen Kahanist extremists." The Secretary held these four documents sufficient evidence to support the redesignation of Kahane Chai and we agree.

The petitioners apparently assume that if the record does not expressly tie Kahane Chai to a threat of assassination, then the Secretary may not designate it as a FTO on that ground. We do not read "substantial support" so narrowly; rather, the record need provide only a sufficient basis for a reasonable person to conclude that Kahane Chai was likely behind such a threat. *See PMOI I*, 182 F.3d at 25; *cf. Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938) ("substantial evidence" standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

In this case the record indicates—and the petitioners do not deny—that Kahane Chai venerates Baruch Goldstein because he massacred 29 Arab worshippers at the Al-Haram Al-Ibrahimi (Sanctuary of Abraham) or Tomb of the Patriarchs in Hebron. Following the attack Kahane Chai issued a statement calling Goldstein a "hero" and in 2002 its alter ego Kach went so far as to advertise a summer camp for children the program of which included "a pilgrimage to [Goldstein's] grave." Kahane Chai's glorification of the murderous Goldstein, though hardly dispositive,

surely makes more credible the evidence supporting the organization's involvement in threats of assassination.

With this in mind, the Secretary reasonably found Kahane Chai was responsible for the death threats made in 2002 against the police officers investigating the Jewish terrorist squad case. The record does not identify any one group as being responsible for the threats, but the evidence suggests Kach was involved in the underlying crime. A man described in a cable from the American Consulate in Jerusalem to the Secretary of State as "a leader" of Kach—which is to say, Kahane Chai—was "reportedly arrested in connection with the attempted bombing." Clearly, Kach/Kahane Chai took a strong interest in the affair, as indicated by the demonstrations at the home of the Shin Bet official. Surely the Secretary could reasonably conclude that an organization (1) known to approve of terrorist tactics, including the mass murder of Arab worshippers, (2) possibly linked to the attempted bombing of an Arab school, and (3) demonstrably interested in the latter affair, was responsible for the death threats made against the officers investigating that crime. (Kahane Chai does not argue that death threats against police officers are not threats of assassination and we therefore take the point as conceded.)

Finally, the Secretary reasonably found Kahane Chai had threatened the life of then-Prime Minister Sharon. Shin Bet Director Avi Dichter warned of an increased threat to Sharon's life based upon comments from both "right-wing Jewish extremists and Palestinian terrorist organizations," including among the former "several dozen Kahanist extremists." The petitioners claim not all Kahanists are members of Kahane Chai and therefore argue the alleged threat cannot be linked to Kahane Chai. The record provides some support for the petitioners' point about membership, but we do not invalidate a designation simply because it is logically possible that the Secretary's conclusion might be wrong. Rather, our task is to determine whether there is in the record substantial support for the Secretary's conclusion. And there is: The Shin Bet Director clearly identified a threat from "Kahanist extremists" and the Secretary could reasonably infer that a Kahanist extremist is likely a member of Kahane Chai.

Upon the basis of the foregoing analysis, we conclude the Secretary's redesignation of Kahane Chai as a FTO has substantial support in the record. Therefore, we consider neither the Department's other evidence in support of this redesignation nor Kahane Chai's objections thereto.

2. Designation of Kach and Kahane.org

When a FTO is known by another name, the organization may be designated a FTO under that name as well. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 346 U.S. App. D.C. 131, 251 F.3d 192, 200 (D.C. Cir. 2001) (*NCRI I)* ("If the Secretary has the power to work those dire consequences [associated with designation] on an entity calling itself 'Organization A,' the Secretary must be able to work the same consequences on the same entity while it calls itself 'Organization B'"). The petitioners contend the Secretary's redesignation of Kach as an alias of Kahane Chai lacks substantial support in the record. In response, the Government points both to a report by the Center for Defense Information stating that the groups have "an overlapping membership of several dozen core members," and to Kahane Chai leader Michael Guzofsky's public statement, quoted in the *New York Times*, that "if we can't be KACH or Kahane Chai we will be simply Kahane." In addition, the declaration of Kenneth Piernick, then the Acting Chief of International Terrorism Operations Section II, Counterterrorism Division, Federal Bureau of Investigation, states that "the principal US members of Kahane Chai/KACH have consistently" changed the names of their organization in an attempt to evade legal responsibility for their actions.

This evidence provides substantial support for the Secretary's redesignation of Kach as an alias of Kahane Chai. The organizations protest that they are distinct because, as Mr. Piernick himself attests, Kahane Chai was formed at the instance of Guzofsky and others "who believed that KACH was not taking a strong enough stand against the Arabs." That was in 1990, however. As the Department correctly pointed out in the analysis it prepared for the Secretary of the materials submitted by counsel for the petitioners, "separate groups with overlapping membership and similar goals may effectively merge and become one organization"

over time. Tellingly, the petitioners did not present any evidence to suggest the two organizations, although apparently different in 1990, were still separate and distinct in 2003 or 2004.

The petitioners also claim the Secretary's designation of Kahane.org as a FTO lacks substantial support. Under the AEDPA, if a FTO "so dominates and controls" an entity that "the latter can no longer be considered meaningfully independent from the former," *Nat'l Council of Resistance of Iran v. Dep't of State*, 362 U.S. App. D.C. 143, 373 F.3d 152, 158 (D.C. Cir. 2004) (*NCRI II*), then the controlled entity may be deemed a FTO. A weaker principal-agent relationship may be sufficient as well. *See id.*

The record contains an analysis of Kahane.org by the FBIS concluding "there is little difference between the agendas and the websites" of Kach and Kahane Chai on the one hand and those of Kahane.org on the other. This conclusion was based upon an analysis of the website's "content, design, and hyperlinks." The report also identifies Kahane.org's "billing contact" as Michael Guzovsky—a leader, as we have seen, of Kahane Chai, and one who believed a change of name was just the thing to evade responsibility.

Kahane.org argues the analysis by the FBIS does not provide substantial support for its designation as a controlled entity of Kahane Chai because "many organizations that have similar ideologies and interests have common links and sometimes have similar layouts in their web pages." Again this argument rests upon the mistaken premise that substantial support means conclusive proof. On the contrary, the Secretary is not obliged to negate every exculpatory possibility raised by a candidate for designation as a FTO. He may, that is, adduce substantial support for a conclusion that, if all the facts were known, might be erroneous.

In this case, the identification of Guzofsky, the chameleon-like leader of Kahane Chai, as the billing contact for Kahane.org, in combination with the similarity of the website's agenda to that of Kahane Chai, provides substantial support for the conclusion that Kahane.org is not "meaningfully independent" of Kahane Chai. We therefore hold the Secretary had sufficient information before him to conclude that Kach is an alias and Kahane.org is a controlled entity of Kahane Chai.

03-Cummins-Chap03.indd 196 10/22/07 11:33:58 PM

B. Due Process

An organization with a sufficient connection to the United States has the right to be heard "at a meaningful time and in a meaningful manner," *NCRI I*, 251 F.3d at 208 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)), before being deprived of a protected interest in liberty or property. Consequently, unless it makes a showing of particularized need not to do so, *id.* at 208, the Government must notify such an organization of its impending designation as a FTO and of the unclassified items upon which the Government proposes to base that designation. *Id.* at 208-09. Furthermore, the organization must be given an opportunity to present in written form such evidence as it can to rebut the evidence in the record or otherwise to fend off its impending designation. *Id.* at 209.

The present petitioners were not given access to the administrative record before they were designated or redesignated FTOs in 2003. . . .

We do not resolve the petitioners' claims of procedural error because the alleged errors were, in the particular circumstances of this case, clearly rendered harmless. In response to the petitioners' procedural objections, the Government offered to do and in 2004 did a *de novo* determination of their status. This time the petitioners were provided, and took full advantage of, the opportunity to inspect and to supplement the record upon which the review would be based. The result was the same as in 2003—all three petitioners were designated or redesignated FTOs—and the petitioners have not challenged the 2004 review. It follows apodictically that providing the petitioners with the administrative record prior to the 2003 designation would have had no effect upon the outcome of which they now complain.

The petitioners nonetheless claim the procedures used in the 2003 review harmed them because the Department's subsequent agreement to do a *de novo* review caused a delay in filing the administrative record, and thereby delayed their opportunity for judicial review. Even if true, however, the point is irrelevant. An error is harmless if it was not material to the outcome of the proceeding. *PDK Labs., Inc. v. United States DEA*, 360 U.S. App. D.C. 344, 362 F.3d 786, 799 (D.C. Cir. 2004). The outcome of

the 2004 review, which was unaffected by any allegedly defective procedure, shows the outcome of the 2003 review would not have been different if the Government had provided the petitioners with the record and an opportunity to present evidence in 2003.

C. Free Speech

The petitioners argue that designating Kahane.org a FTO violates the First Amendment because the website is a "medium of free speech"; it "expresses a viewpoint[, b]ut it does not advocate terror." As the Government points out, however, and as we have held, the AEDPA does not purport to restrain speech; the statute "is not aimed at interfering with the expressive component of [an organization's] conduct." *PMOI II,* 327 F.3d at 1244 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000)). Instead, the focus is upon the nonexpressive component of the organization's conduct, *see id.*, and the Government clearly may restrain such conduct when it facilitates terrorist activity. *See Humanitarian Law*, 205 F.3d at 1134-35 ("While the First Amendment protects the expressive component of seeking and donating funds, expressive *conduct* receives significantly less protection than pure speech").

Kahane.org has been designated a controlled entity of Kahane Chai and we have upheld that designation. A restraint upon the conduct of Kahane.org is therefore tantamount to a restraint upon the conduct of Kahane Chai itself. *See NCRI I*, 251 F.3d at 200. And it is established that the restraints imposed upon a FTO by the AEDPA—namely the organization's loss of access to funds held by financial institutions subject to United States law, the inability of alien representatives of the FTO to receive visas or enter the United States, and the prohibition upon knowingly donating to the FTO—do not violate the FTO's first amendment right to speak, *see PMOI II*, 327 F.3d at 1244-45; *see also Humanitarian Law*, 205 F.3d at 1135-36, a point not even Kahane Chai challenges. It follows that the AEDPA's restraints upon Kahane.org do not violate its first amendment right to speak.

D. Religious Discrimination

Kahane.org maintains the State Department discriminated against it upon the basis of religion because the Department in 2003,

the first year in which it designated any websites as FTOs, "designat[ed] only Jewish websites, all alleged aliases of Kahane Chai, when other FTOs have websites, and sometimes use those sites for despicable purposes." This claim implicitly assumes websites designated as FTOs are the appropriate universe within which to determine whether there has been discrimination against a particular religion. The petitioners offer no defense of that assumption, we see none, and common sense suggests the appropriate universe for evaluation of a discrimination claim is the complete list of designated FTOs, which, as the petitioners acknowledge, includes many non-Jewish organizations. Consequently, we find no evidence of religious discrimination at work in the designation of Kahane.org.

* * * *

(2) 1624 Report

On June 7, 2006, the United States provided a report to the United Nations Counter-Terrorism Committee regarding the United States' efforts to implement United Nations Security Council Resolution 1624 (2005). *Response of the United States of America to the Counter-Terrorism Committee: United States Implementation of United Nations Security Council Resolution 1624* (S/2006/397, June 16, 2006), available at *documents.un.org*. The report summarized what the United States has done (and was considering) in terms of implementing measures that are necessary, appropriate, and in accordance with its obligations under international law to prohibit and prevent incitement to commit terrorist acts. It further addressed efforts to deny safe haven to persons who have incited terrorist activities; cooperation with other States to prevent transit of persons who have incited terrorist activities; international efforts to enhance dialogue and broaden understanding among civilizations; steps being taken to counter incitement of terrorist acts motivated by extremism; and steps taken to ensure that implementation of Resolution 1624 complies with U.S. obligations under international law, and particularly human rights, refugee, and humanitarian law.

The full text of the report, excerpted below, is available at *http://documents.un.org.* (Footnotes are omitted).

1.1 What measures does the United States have in place to prohibit by law and to prevent incitement to commit a terrorist act or acts? What further steps, if any, are under consideration?
UNSCR 1624 "calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . prohibit by law incitement to commit a terrorist act or acts [and] prevent such conduct." The United States has in place a number of legal measures that comport with these provisions of UNSCR 1624 and is currently studying additional measures and ways of using existing authorities to advance the purposes of this resolution.

Measures taken by the United States that are relevant to the prohibition and prevention of incitement as called for in UNSCR 1624 include: (1) criminalization of solicitation to violence, seditious conspiracy, and advocacy of the overthrow of Government and criminalization of certain "inchoate crimes" that permit prosecution of preparatory acts to substantive criminal conduct, including acts of terrorism; (2) designation of terrorist organizations with the resulting legal consequences; and (3) making inadmissible to the U.S. aliens who have either incited terrorist activity with the intention to cause death or serious bodily injury, or endorsed or espoused terrorist activity, or persuaded others to endorse or espouse terrorist activity.

General Considerations

In considering whether a measure relating to UNSCR 1624 is "necessary and appropriate and in accordance with [a State's] obligations under international law" particular consideration must be given to whether the measure appropriately takes into account the right of freedom of expression.

The right of freedom of expression is enshrined in Article 19 of the International Covenant on Civil and Political Rights, which provides (in pertinent part) that "[e]veryone shall have the right to freedom of expression" and that this right may be restricted only

where provided by law and necessary "for the rights or reputations of others, or for the protection of national security or public order, or of public health or morals." When it ratified the ICCPR, the United States specifically declared that the ICCPR provision stating that "fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent" has "particular relevance" to the restrictions on freedom of expression in Article 19. The United States further declared that it "will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations." The United States also entered a reservation, to which no country filed an objection, that Article 20 (which states that "any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law") "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

In the United States, freedom of expression is protected by the First Amendment to the Constitution. . . . The U.S. Supreme Court has interpreted the free speech guarantee of the First Amendment to extend beyond the expression of personally held beliefs to include speech advocating illegal conduct.

In *Brandenburg v. Ohio*, the Supreme Court overturned the defendant's conviction in state court for participating in a Ku Klux Klan organizational rally. The Court held unanimously that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce that action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Because this test requires proof of both an intent to incite or produce unlawful action and a likelihood that the speech will incite imminent unlawful action, there has never been a case in the U.S. in which the mere publication of written materials was found to be a punishable incitement offense. Rather, *Brandenburg's* rule permitting prosecution has typically been applied in cases where a

speaker urges an already agitated mob to commit illegal acts (such as assaulting a passing victim).

As a result, the majority of the terrorist propaganda found on the Internet today could not be prosecuted under U.S. criminal law. Even a page on the World Wide Web advocating committing acts of terrorist violence likely lacks (at least without proof of additional facts) the potential to produce imminent lawless action required under the *Brandenburg* exception.

Relevant Criminal Statutes

While U.S. Constitutional protections for free speech limit the extent to which the U.S. can criminalize speech, a number of U.S. statutes criminalize speech-related conduct that supports or encourages violent acts, including terrorist acts (whether or not the relevant statute specifically characterizes it as "incitement" or specifically refers to "terrorism").

First, the federal criminal solicitation statute, 18 U.S.C. § 373, makes it a crime "with intent that another person engage in [the] conduct," to "solicit[], command[] induce[] or otherwise endeavor[] to persuade [an]other person to engage in" the use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States. 18 U.S.C. § 373(a).

Significantly, this statutory prohibition makes speech punishable when the defendant specifically intends that "another person engage in [the] conduct constituting a felony" and where the surrounding circumstances are "strongly corroborative of that intent." *See* 18 U.S.C. § 373(a). Such additional qualifications are intended to preserve the vitality of the solicitation statute from a First Amendment-based challenge.

However, the offense of solicitation is complete when the defendant attempts to persuade another to commit a crime. It is therefore inconsequential whether the contemplated federal crime of force or violence was actually consummated or whether the defendant even succeeded in inducing his subject to attempt such commission. . . . Thus, solicitation does not require that the proponent of the criminal act successfully persuade his listener to use unlawful physical force so long as it is clear that he or she intended to do so.

. . . [T]he statute could also be deployed to reach solicitation to commit the use or threatened use of force against persons or property relating to the commission of acts of terrorism. *See, e.g.,* 18 U.S.C. § 2332(b) (acts of terrorism, such as murder, maiming, or kidnapping, transcending national boundaries); 18 U.S.C. § 2332f (bombings of places of public use); 49 U.S.C. § 46502 (aircraft piracy).

Two U.S. criminal statutes address acts that are intended to advance the forceful overthrow of the government. 18 U.S.C. § 2384 prohibits seditious conspiracy (plotting to use force to overthrow the government). 18 U.S.C. § 2385 proscribes teaching or advocating the duty or necessity of overthrowing or destroying the government of the United States by force or violence; publishing or circulating literature which so teaches or advocates; joining or organizing any group which so teaches or advocates, knowing the purposes thereof; or conspiring to do any of the foregoing.

In the past, the United States has used Sections 2384 and 2385 primarily during times of civil strife or national emergency. However, in the 1990s, a U.S. court convicted terrorist Sheik Omar Amad Ali Abdel Rahman ("Rahman") of violating 18 U.S.C. § 2384, and other criminal statutes, for his involvement in alleged terrorist plots to bomb New York City facilities and to assassinate certain persons. . . . The U.S. Court of Appeals for the Second Circuit subsequently upheld Rahman's conviction. . . .

In addition to the foregoing authorities, the U.S. criminal code contains other "inchoate crimes" that permit the prosecution of preparatory acts to substantive criminal conduct, including acts of violence and acts of terrorism. *See, e.g.,* 18 U.S.C. § 2 (prohibiting aiding, abetting, counseling, commanding and inducing an offense); 18 U.S.C. § 2339B(a)(1) (prohibiting conspiring to and attempting to provide material support to a foreign terrorist organization); 18 U.S.C. § 371 (prohibiting conspiring to commit an offense against the United States); 18 U.S.C. § 842(p) (prohibiting teaching or demonstrating the making or use of, or distributing information pertaining to the manufacture or use of, explosives, destructive devices and weapons of mass destruction with the intent or knowledge that the information will be used to commit a crime of vio-

lence); 18 U.S.C. § 956 (prohibiting conspiring to kill, kidnap, injure or maim a person outside the U.S.); 18 U.S.C. § 2332b (prohibiting conspiring to commit an act of terrorism that transcends national boundaries). Additionally, statutes implementing the UN terrorism conventions and protocols also include provisions that embrace inchoate offenses, *see, e.g.,* 49 U.S.C. § 46502(a) (prohibiting conspiring to and attempts to commit aircraft piracy). Although these inchoate crime provisions do not criminalize mere incitement, they often permit U.S. authorities to prosecute individuals as soon as they communicate an intent to commit an act of terrorism and join with others in working to carry it out.

In addition, Sections 2339A and 2339B of Title 18 of the U.S. Code prohibit knowingly or intentionally providing, attempting to provide, or conspiring to provide material support or resources to a terrorist organization, defining the term "material support or resources" to include "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." See 18 U.S.C. §§ 2339A and 2339B.

Although the First Amendment of the U.S. Constitution limits the ability of the U.S. to prosecute incitement to commit acts of terrorism to the strict set of circumstances set forth in *Brandenburg*, the robust "inchoate crime" and "material support" provisions in U.S. law permit the prosecution of those supporting terrorism in the early planning stages, well before commission of the terrorist act is imminent. Given the overlap between supporters of terrorism and those who incite terrorism these laws also further the goals set forth in UNSCR 1624 of preventing and prohibiting incitement to terrorism.

Relevant Designation and Related Authorities

U.S. designation authorities are another measure to prevent incitement to terrorism. In particular, U.S. law provides that incitement to commit a terrorist act (under circumstances indicating an

intention to cause death or serious bodily injury) is a basis for designating a group as either a "foreign terrorist organization" under 8 U.S.C. § 1189 or as a terrorist organization for immigration purposes under 8 U.S.C. § 1182(a)(3)(B)(vi)(II), provided that other relevant legal criteria are met. Moreover, even if a group has not been formally designated, such incitement will automatically result in its treatment as a terrorist organization for immigration purposes under 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

Designation or treatment as a terrorist organization under these authorities results in the imposition of significant sanctions. . . . Thus, treating a group as a terrorist organization is not only a way to sanction terrorist inciters but also creates significant disincentives for those who might otherwise knowingly support terrorist inciters.

By way of a practical illustration, in December 2004, using the authority of 8 U.S.C. § 1182(a)(3)(B)(vi)(II), and on the basis that it incites to commit, under circumstances indicating an intention to cause death or serious bodily injury, terrorist activity, the United States designated the Al-Manar satellite television operation (which is owned or controlled by the Hizballah terrorist network) as a terrorist organization for immigration purposes under 8 U.S.C. § 1182(a)(3)(B)(vi)(II). As a result of this designation, any aliens providing material support, or having certain other links to, Al-Manar (including anyone who is a member or representative of, or who solicits funds or other things of value for, the organization) may be found inadmissible to the United States or may be deported.

In addition to its designation authorities under Title 8 of the U.S. Code, the United States also has authority under Executive Order 13224 to block the property and prohibit transactions with, among others, persons who (1) have committed or pose a significant risk of committing acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy or economy of the United States; or (2) assist in, sponsor, or provide financial, material or technological support for, or financial or other services to or in support of those persons determined to be subject to E.O. 13224. Although incitement is not a specific basis for designation under E.O. 13224, media outlets and others may be designated on the grounds that they are owned or controlled by,

or provide support to, terrorist organizations that have already been designated under E.O. 13224.

In March of 2006, the United States used this authority to designate Al-Manar, Al-Nour Radio, and the Lebanese Media Group, the parent company of Al-Manar and Al-Nour, because of (among other things) Hizballah's ownership and control of these entities and because these entities facilitated Hizballah's activities by supporting fundraising and recruitment efforts. By blocking the assets of these entities, and by criminalizing knowing transactions with them, the designation of these entities under E.O. 13224 helps to restrict their ability to act as terrorist inciters. This domestic authority parallels in many ways the designation mechanism provided in United Nations Security Council Resolution 1267, and its successors, for those associated with Usama bin Laden, Al Qaida, and the Taliban. UNSCR 1267 may provide an additional, effective mechanism for acting against those associated with Usama bin Laden, Al Qaida, and the Taliban who incite others to commit acts of terrorism.

Authority to Render an Individual Inadmissible

The U.S.'s immigration laws also currently permit the U.S. to exclude, deport or deny asylum to aliens that have incited terrorism under circumstances indicating an intention to cause death or serious bodily harm.

Following the events of September 11, 2001, the U.S. Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001). This law strengthened the ability of the U.S. government to restrict terrorist travel, because those who engage in terrorist activity are inadmissible to the United States. The Patriot Act broadened the terrorism-related grounds for alien inadmissibility and removability and expanded the definitions of "terrorist organization" and "terrorist." Those provisions were further expanded by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 ("REAL ID Act"), at Sections 103 and 104 of Division B. Consequently, U.S. immigration laws currently make inadmissible to the United States

aliens who, under circumstances indicating an intention to cause death or serious bodily harm, have incited terrorist activity, *see* 8 U.S.C. § 1182(a)(3)(B)(i)(III) and (iv)(I), as well as making inadmissible aliens who endorse or espouse terrorist activity or persuade others to endorse or espouse terrorist activity. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(VI); *see also*, 8 U.S.C. §§ 1158(b)(2)(A)(v), 1227(a)(4)(B).

1.2 What measures does the United States take to deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of incitement to commit a terrorist act or acts?

As noted in 1.1, U.S. immigration law makes inadmissible to the United States aliens who, under circumstances indicating an intention to cause death or serious bodily harm, have incited terrorist activity. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(III) and (iv)(I). Also, as noted in 1.1, a separate provision renders inadmissible anyone who endorses or espouses terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(i)(VI).

1.3 How does the United States cooperate with other States in strengthening the security of its international borders with a view to preventing those guilty of incitement to commit a terrorist act or acts from entering their territory, including by combating the fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures?

The United States works with foreign partners, and especially with Mexico and Canada in accordance with the Security and Prosperity Partnership for North America, to enhance our collective ability to identify fraudulent travel documents and to develop and implement compatible screening and security procedures. Additionally, the United States shares certain types of terrorist screening information with foreign partners, including countries that participate in the U.S. Visa Waiver Program. The United States is also working to help foreign partners improve their judicial systems and the physical and procedural security of their travel documents, and to better combat terrorism and travel-related fraud by increasing relevant penalties.

The U.S. government maintains electronic systems to screen all individuals seeking entry into the United States against watch-lists of known and suspected terrorists. As directed by President George W. Bush, the U.S. government, led by the Department of State, is working with international partners to facilitate the exchange of terrorist screening information maintained by the U.S. Terrorist Screening Center and its foreign counterparts, and to develop new foreign partners willing to exchange such information.

In addition, the Department of Homeland Security (DHS) is working extensively with the international community to strengthen global mechanisms of international travel against all individuals who would seek to exploit vulnerabilities in those mechanisms to illicitly travel from country to country. To this end, DHS works regularly with the International Civil Aviation Organization (ICAO), a recognized international standards setting organization. Specifically, DHS participates in a variety of working groups intended to improve global standards for document and border security, including, the ICAO Document Content and Format Working Group (DCFWG) and the New Technologies Working Group (NTWG).

ICAO has recently revised Chapter 3 of Annex 9 to the Convention on International Civil Aviation in an attempt to reduce the use of fraudulent travel documents. As revised, Chapter 3 requires that States seize fraudulent, altered, and counterfeit documents, as well as travel documents presented by those who are not the rightful owner, thereby removing them from circulation. States are to return these documents to the appropriate authorities of the issuing State.

In January 2005, U.S. Customs and Border Protection (CBP) adopted the policy of removing from circulation all fraudulent travel documents encountered at U.S. ports of entry and at mail facilities. At that time, CBP created the Fraudulent Document Analysis Unit (FDAU) to receive all confiscated travel documents, analyze them for intelligence information, and dispose of them according to international standards adopted by ICAO. To date, CBP/FDAU has returned over 5,600 fraudulent passports to 27 respective Embassies in Washington D.C. Additional intelligence

information relating to the use of fraudulent travel documents is also shared, as appropriate, with foreign officials.

To strengthen its ability to identify the fraudulent use of lost, stolen or otherwise invalid travel documents, DHS is engaging with Interpol and Asia-Pacific Economic Cooperation (APEC) to ensure CBP officers have current and accurate information about lost and stolen documents issued by other governments. In cooperation with Interpol, DHS is exploring the integration of a check against the Interpol Automated Search Facility/Stolen and Lost Travel Documents (ASF/SLTD) database as part of the regular processing of all travelers entering the United States. This database is an internationally recognized repository for lost and stolen identity documents issued by member governments to which DHS encourages all States to contribute timely and complete data. In addition, through APEC, CBP is working with Australia and New Zealand on the Regional Movement Alert List pilot, which seeks to enable the real-time sharing of lost and stolen passport information between participating economies through a centralized query broker.

Bilaterally, DHS has initiated arrangements with Poland and the Netherlands to implement the Immigration Advisory Program. Under these arrangements, U.S. CBP officers are stationed at foreign airports to assist local authorities and air carriers in checking documentation of high-risk passengers prior to departure and making preliminary decisions regarding admissibility.

Similarly, the United States government works closely with the 27 countries to which it extends visa free travel privileges through the Visa Waiver Program. As participants in the program, partnering nations agree to implement biometric passports, share lost and stolen passport information and maintain a high level of border security in their own territories.

Also, in support of international cooperation in the effort to combat the use of fraudulent travel documents, CBP participates in the Immigration Fraud Conference (IFC). The IFC is an annual meeting of document specialists in the field of Immigration/Border Control fraud and passport and document abuse. The conference is a well-established forum for the exchange of information between

member countries in areas of mutual interest. There are currently 20 member countries.

Similarly, DHS participates in a variety of standing international dialogues to discuss border security and counterterrorism issues, including with the United Kingdom, Australia, Canada, Mexico, European Union, and the G8.

* * * *

1.6 What is the United States doing to ensure that any measures taken to implement paragraphs 1, 2 and 3 of resolution 1624 (2005) comply with all of its obligations under international law, in particular international human rights law, refugee law, and humanitarian law?

The United States seeks to ensure that its law and practice are consistent with its international obligations. As described in the response to question 1.1 above, U.S. constitutional law provides protections for free expression more robust than those called for in the International Covenant on Civil and Political Rights. In addition, new legislation is reviewed for consistency with the ICCPR and other human rights treaties to which the U.S. is party, the Protocol Relating to the Status of Refugees, and other U.S. treaty obligations. The United States recently reported in detail to the respective treaty bodies on its compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and with the ICCPR. The full reports and the transcript can be found at *http://www.state.gov/g/drl/rls/ and http://geneva.usmission.gov/*.

(3) New sanctions

Section 12 of the State Department Authorities Act of 2006, Pub. L. No. 109-472 (2007) authorizes the President to impose sanctions to deter the transfer of man-portable air defense systems ("MANPADS"). Under this legislation, when the President finds that a foreign government knowingly transfers MANPADS to state-sponsors of terrorism or to terrorist organizations, he is to impose the following sanctions upon

the transferring foreign government:

> (1) Termination of United States Government assistance to the transferring foreign government under the Foreign Assistance Act of 1961, except that such termination shall not apply in the case of humanitarian assistance.
>
> (2) Termination of United States Government—
>
> (A) sales to the transferring foreign government of any defense articles, defense services, or design and construction services; and
>
> (B) licenses for the export to the transferring foreign government of any item on the United States Munitions List.
>
> (3) Termination of all foreign military financing for the transferring foreign government.

The President may waive sanctions if he "determines and certifies in writing to [Congress] that the furnishing of the assistance, sales, licensing, or financing that would otherwise be suspended as a result of the imposition of such sanctions is important to the national security interests of the United States."

f. UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

On February 17, 2006, the United States signed two protocols amending the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA") and its related Protocol on Fixed Platforms. A media note of that date from the Office of the Department of State Spokesman stated:

> . . . The treaties create an international criminal framework for combating, on the high seas, the use of a ship to undertake a terrorist attack or to transport terrorists or cargo intended for use in weapons of mass destruction programs. They also create a new international framework

for boarding ships carrying items of proliferation concern and for interdiction of the items.

The new Protocols, when they enter into force, will add to the 12 already existing UN counterterrorism conventions and will be an important tool in the worldwide fight against terrorism and proliferation.

We strongly encourage all Parties to the SUA to sign and ratify the two new protocols as quickly as possible.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/61506.htm*.

2. Genocide, War Crimes, and Crimes Against Humanity

See International Tribunals and Related Issues, below, and Chapter 6.G.

3. Narcotrafficking

a. Counternarcotics certification

On March 1, 2006, the Department of State released the 2006 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act, as amended, 22 U.S.C. §2291h(a). The report describes the efforts of key countries to attack all aspects of the international drug trade in Calendar Year 2005. Volume I covers drug and chemical control activities and Volume II covers money laundering and financial crimes. The report is available at *www.state.gov/p/inl/rls/nrcrpt/2006*.

On September 15, 2006, President Bush released Presidential Determination No. 2006-24, on "Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2007." 71 Fed. Reg. 57,865 (Sept. 29, 2006). The President's determination named countries meeting the definition of a major drug transit or major illicit drug producing country and determined further that of those countries,

> Burma and Venezuela had "failed demonstrably . . . to adhere to their obligations" in fighting narcotrafficking. The text of the determination addressing these and other issues is set forth below. Annex A, providing the justification for determinations concerning Burma and Venezuela, is available at *www.state.gov/p/inl/rls/prsrl/ps/72379.htm*.

Pursuant to section 706(1) of the Foreign Relations Authorization Act, FY03 (Public Law 107-228) (FRAA), I hereby identify the following countries as major drug transit or major illicit drug producing countries: Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela.

A country's presence on the Majors List is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. Consistent with the statutory definition of a major drug transit or drug producing country set forth in section 481(e)(2) and (5) of the Foreign Assistance Act of 1961, as amended (FAA), one of the reasons that major drug transit or illicit drug producing countries are placed on the list is the combination of geographical, commercial, and economic factors that allow drugs to transit or be produced despite the concerned government's most assiduous enforcement measures.

Pursuant to section 706(2)(A) of the FRAA, I hereby designate Burma and Venezuela as countries that have failed demonstrably during the previous 12 months to adhere to their obligations under international counternarcotics agreements and take the measures set forth in section 489(a)(1) of the FAA. Attached to this report (Tab A) are justifications for the determinations on Burma and Venezuela, as required by section 706(2)(B).

I have also determined, in accordance with provisions of section 706(3)(A) of the FRAA, that support for programs to aid Venezuela's democratic institutions is vital to the national interests of the United States.

Although President Karzai has strongly attacked narcotrafficking as the greatest threat to Afghanistan, one third of the Afghan economy remains opium-based, which contributes to widespread

public corruption. The government at all levels must be held accountable to deter and eradicate poppy cultivation; remove and prosecute corrupt officials; and investigate, prosecute, or extradite narcotraffickers and those financing their activities. We are concerned that failure to act decisively now could undermine security, compromise democratic legitimacy, and imperil international support for vital assistance.

My Administration is concerned with the decline in Bolivian counternarcotics cooperation since October 2005. Bolivia, the world's third largest producer of cocaine, has undertaken policies that have allowed the expansion of coca cultivation and slowed the pace of eradication until mid-year, when it picked up. The Government of Bolivia's (GOB) policy of "zero cocaine, but not zero coca" has focused primarily on interdiction, to the near exclusion of its necessary complements, eradication and alternative development. However, the GOB has been supportive of interdiction initiatives and has had positive results in seizing cocaine and decommissioning rustic labs. We would encourage the GOB to refocus its efforts on eliminating excess coca, the source of cocaine. This would include eradicating at least 5,000 hectares, including in the Chapare region; eliminating the "cato" exemption to Bolivian law; rescinding Ministerial Resolution 112, Administrative Resolution 083, and establishing tight controls on the sale of licit coca leaf for traditional use; and implementing strong precursor chemical control measures to prevent conversion of coca to cocaine. My Administration plans to review Bolivia's performance in these specific areas within 6 months.

The Government of Canada (GOC) continued to effectively curb the diversion of precursor chemicals that are required for methamphetamine production to feed U.S. illegal markets. The GOC also continued to seize laboratories that produce MDMA/Ecstasy consumed in both Canada and the United States. The principal drug concern was the continuing large-scale production of high-potency, indoor-grown marijuana for export to the United States. The United States enjoyed excellent cooperation with Canada across a broad range of law enforcement issues and shared goals.

The Government of Ecuador (GOE) has made considerable progress in combating narcotics trafficking destined for the United States.

03-Cummins-Chap03.indd 214 10/22/07 11:34:01 PM

However, a dramatic increase in the quantity of cocaine transported toward the United States using Ecuadorian-flagged ships and indications of increased illegal armed group activity along Ecuador's northern border with Colombia remain areas of serious concern. Effective cooperation and streamlined maritime operational procedures between the U.S. Coast Guard and the Ecuadorian Navy are resulting in an increase in the amount of cocaine interdicted. Building on that cooperation, we will work with Ecuador to change the circumstances that make Ecuadorian-flagged vessels and Ecuadorian citizenship so attractive to drug traffickers.

As a result of the elections in Haiti, the new government now has a clear mandate from the Haitian people to bring crime, violent gangs, and drug trafficking under control. We urge the new government to strengthen and accelerate ongoing efforts to rebuild and reform Haiti's law enforcement and judicial institutions and to consult closely with the United States to define achievable and verifiable steps to accomplish these goals.

While the Government of Nigeria continues to take substantive steps to curb official corruption, it remains a major challenge in Nigeria. We strongly encourage the government to continue to adequately fund and support the anti-corruption bodies that have been established there in order to fully address Nigeria's ongoing fight against corruption. We urge Nigeria to continue improving the effectiveness of the National Drug and Law Enforcement Agency and, in particular, improve enforcement operations at major airports/seaports and against major drug kingpins, to include targeting their financial assets. We look forward to working with Nigerian officials to increase extraditions and assisting in drug enforcement operations.

Although there have not been any drug seizures or apprehensions of drug traffickers with a connection to the Democratic People's Republic of Korea (DPRK) since 2004, we remain concerned about DPRK state-directed criminal activity. The United States Government has made clear to the DPRK that an end to all involvement in criminal activity is a necessary prerequisite to entry into the international community.

Under provisions of the Combat Methamphetamine Epidemic Act (CMEA), which modified section 489(a) of the Foreign Assistance Act of 1961, as amended, and section 490(a) of the FAA, a report

will be made to the Congress on March 1, 2007, naming the five countries that legally exported the largest amount of methamphetamine precursor chemicals, as well as the top five methamphetamine precursor importers with the highest rate of diversion for illicit drug production. This report will be sent concurrently with the International Narcotics Control Strategy Report, which will also contain additional reporting on methamphetamine precursor chemicals pursuant to the CMEA.

b. International production and trafficking of methamphetamine

On March 9, 2006, President Bush signed into law the Combat Methamphetamine Epidemic Act ("CMEA"), enacted as Title VII, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, referred to *supra*. Among other things the CMEA amended § 489(a) of the Foreign Assistance Act of 1961, as amended ("FAA"), 22 U.S.C. § 2291, to address concerns with methamphetamine in the same manner that major drug producing and drug transit countries are currently covered in the narcotics certification process. Section 2291h(a) was amended to require that the annual International Narcotics Control Strategy Report, submitted to Congress on March 1 of each year contain:

(i) An identification of the five countries that exported the largest amount of pseudoephedrine, ephedrine, and phenylpropanolamine (including the salts, optical isomers, or salts of optical isomers of such chemicals, and also including any products or substances containing such chemicals) during the preceding calendar year.

(ii) An identification of the five countries that imported the largest amount of the chemicals described in clause (i) during the preceding calendar year and have the highest rate of diversion of such chemicals for use in the illicit production of methamphetamine (either in that country or in another country).

(iii) An economic analysis of the total worldwide production of the chemicals described in clause (i) as compared to the legitimate demand for such chemicals worldwide.

In addition, the annual certification procedures, set forth in § 490 of the FAA, 22 U.S.C. § 2291j(a), were amended by adding to the list of countries that must be certified as "fully cooperating" to make adequate efforts to fight narcotrafficking during the previous twelve months the countries identified as among the top five exporters and importers of the listed precursor chemicals. The amendments further provided that alternate procedures applicable to countries identified as major drug producing and major drug transit countries set forth in § 706 of the Foreign Relations Authorization of 2003, Pub. L. No. 107-228, do not apply to the countries designated in connection with precursor chemicals. Accordingly, commencing with the March 1, 2007 INCSR, fifty percent of the foreign assistance allocated to the top five importers and exporters of identified precursor chemicals will be withheld until the President certifies for each country that it has "fully cooperated" in the fight against narcotics trafficking. In addition, 180 days after the March INCSR, a report must be submitted to Congress addressing the diversion of the identified precursor chemicals, including the establishment, expansion, and enhancement of regulatory, law enforcement, and other investigative efforts to prevent diversion of the precursor chemicals.

On March 17, 2006, the UN Commission on Narcotic Drugs ("CND") adopted Resolution 49/3, Strengthening Systems for Control of Precursor Chemicals Used in the Manufacture of Synthetic Drugs. *See* Report on the Forty-ninth Session, U.N. Doc. E/CN.7/2006/10 at 22, available at *http://documents.un.org*. The resolution, which was initiated and sponsored by the United States, provided in part that the CND:

> 1. *Requests* Member States to provide to the International Narcotics Control Board annual estimates of their legitimate requirements for 3,4 methylenedioxyphenyl-2-propanone, pseudoephedrine, ephedrine and phenyl-2-propanone and, to the extent possible, estimated requirements for imports of preparations containing those substances that can be easily used or recovered by readily applicable means; [and]

2. *Requests* the International Narcotics Control Board to provide those estimates to Member States in such a manner as to ensure that such information is used only for drug control purposes;

On June 21, 2006, Anne W. Patterson, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, testified before the Subcommittee on International Economic Policy Export and Trade Promotion and the Subcommittee on Western Hemisphere, Peace Corps, and Narcotics Affairs of the Senate Committee on Foreign Relations. Her testimony on efforts to control the international production and trafficking of methamphetamine is excerpted below and available at *www.state.gov/p/inl/rls/rm/72240.htm* (footnotes deleted).

* * * *

Methamphetamine abuse continues to be an enormous problem in this country. Current data on drug and laboratory seizures suggest that roughly 80 percent of the methamphetamine used in the United States comes from larger laboratories, which are increasingly found in Mexico. . . .

* * * *

In order to address international methamphetamine production and trafficking, the Department of State plays an integral role in the Administration's *Synthetic Drug Control Strategy*. We emphasize two key areas: (1) seeking greater international control and transparency in the production, sale, and transportation of methamphetamine's precursor chemicals and the pharmaceutical preparations containing them; and (2) significantly expanding our support and cooperation with the Government of Mexico on precursor control and other methamphetamine specific initiatives.

International Precursor Chemical Control

Most of the methamphetamine consumed in the United States—somewhere between 75 and 85 percent—is produced with chemicals that are diverted from the legitimate flow of international commerce. Therefore, a central focus of the Administration's

strategy is to encourage transparency in the international trade in methamphetamine's precursor chemicals and the pharmaceutical preparations containing them.

The most comprehensive agreement on international chemical control is the 1988 UN *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. While the Convention covers methamphetamine's precursor chemicals such as ephedrine and pseudoephedrine, it exempts finished pharmaceutical preparations containing them. This situation allows criminal organizations to circumvent the Convention by purchasing uncontrolled pharmaceutical preparations on the international market, instead of the regulated bulk precursor chemicals. Furthermore, many countries have simply been reluctant to share information regarding their trade in these substances, because much of the data is commercially sensitive. Complicating matters further, in some countries, these chemicals are regulated by health officials, rather than law enforcement agencies.

Given these challenges, we have found that seeking voluntary cooperation, based on mutual benefit, is the best way to obtain information on the trade in precursor chemicals beyond what is required by the Convention. . . .

DEA also works with foreign law enforcement and regulatory counterparts through *Project Prism*, an international initiative supported by the International Narcotics Control Board (INCB). *Project Prism* brings together relevant institutions and experts from Member States in order to assist governments in developing and implementing operating procedures to control and more effectively monitor the trade in precursor chemicals. *Project Prism* also collects information on pre-export notifications to monitor shipments of the essential precursor chemicals used to produce methamphetamine and other synthetic drugs.

Beyond these established mechanisms to ensure that chemical imports are in line with legitimate requirements, the Department of State, DEA, and the Office of National Drug Control Policy (ONDCP) are working to elevate the threat of methamphetamine in international fora and in bilateral relations. In March, a U.S. sponsored resolution entitled *Strengthening Systems for Control of Precursor Chemicals Used in the Manufacture of Synthetic*

Drugs was adopted by consensus at the 49th UN Commission on Narcotic Drugs (CND). This resolution specifically requests countries to provide the INCB with annual estimates of their legitimate requirements for PMK (a precursor for ecstasy), pseudoephedrine, ephedrine, and phenyl-2-propanone (P2P), as well as the pharmaceutical preparations containing these substances. The resolution also requests countries to permit the INCB to share such information with concerned law enforcement and regulatory agencies. In addition, the INCB has since agreed to publish the data collected on legitimate requirements, which will allow governments to track any spikes in imports, a possible signal of illegal diversion.

The resolution also urges countries to continue to provide to the INCB – subject to their national legislation and taking care not to impede legitimate international commerce – information on all shipments of these substances, including pharmaceutical preparations containing them. Finally, the resolution requests that countries grant permission to the INCB to share the shipment information on these consignments with concerned law enforcement and regulatory authorities to prevent or interdict diverted shipments.

* * * *

Finally, the Department of State also works through the Inter-American Drug Abuse Control Commission (CICAD), to evaluate the use of precursor chemicals and assist countries in strengthening controls. . . . [T]he United States, through its work with CICAD, has assisted in the development of model regulations, information-sharing mechanisms, and guides and reference tools for the control of chemicals.

* * * *

c. Designations under the Kingpin Act

On June 1, 2006, President Bush transmitted to Congress designations of three foreign persons and two foreign entities for sanctions under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§1901-1908 and reported his direction of sanctions against them under that act. 42 WEEKLY

COMP. PRES. DOC. 1066 (June 5, 2006). A statement by the President of the same date explained:

> . . . This action brings the total number of individuals and entities designated under the Kingpin Act to 62 since the first designations were made in 2000.
>
> * * * *
>
> The Kingpin Act, which became law in December 1999, targets significant foreign narcotics traffickers, their organizations and operatives worldwide, denying them access to the U.S. financial system and all trade and transactions involving U.S. companies and individuals. The Kingpin Act does not target the countries in which these foreign individuals and entities are operating or the governments of such countries.

See www.whitehouse.gov/news/releases/2006/06/20060601-9.html.

d. Litigation related to 1971 UN Convention on Psychotropic Substances

On February 21, 2006, the U.S. Supreme Court upheld a preliminary injunction, finding that the United States had failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring importation and use of a sacramental tea from Brazil in religious ceremonies in the United States. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). *See* discussion of the case in the lower courts in *Digest 2005* at 137-44 and *Digest 2003* at 184-86. Excerpts below from the Court's opinion explain the case and address the U.S. arguments concerning obligations under the 1971 UN Convention on Psychotropic Substances (footnotes omitted).

A religious sect with origins in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants

unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government. The Government concedes that this practice is a sincere exercise of religion, but nonetheless sought to prohibit the small American branch of the sect from engaging in the practice, on the ground that the Controlled Substances Act bars all use of the hallucinogen. The sect sued to block enforcement against it of the ban on the sacramental tea, and moved for a preliminary injunction.

It relied on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government "demonstrates that application of the burden to the person" represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b). The District Court granted the preliminary injunction, and the Court of Appeals affirmed. We granted the Government's petition for certiorari. Before this Court, the Government's central submission is that it has a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice. We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.

* * * *

. . . Under [the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*.,] the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." § 2000bb-1(a). The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrate that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb-1(b). A person whose religious practices are burdened

in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." § 2000bb-1(c).

The Controlled Substances Act, 84 Stat. 1242, as amended, 21 U.S.C. § 801 *et seq*. (2000 ed. and Supp. I), regulates the importation, manufacture, distribution, and use of psychotropic substances. . . .

O Centro Espirita Beneficente Uniao do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Central to the UDV's faith is receiving communion through *hoasca* (pronounced "wass-ca"), a sacramental tea made from two plants unique to the Amazon region. One of the plants, *psychotria viridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*. DMT, as well as "any material, compound, mixture, or preparation, which contains any quantity of [DMT]," is listed in Schedule I of the Controlled Substances Act. § 812(c), Schedule I(c).

In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of *hoasca*. A subsequent investigation revealed that the UDV had received 14 prior shipments of *hoasca*. The inspectors seized the intercepted shipment and threatened the UDV with prosecution.

* * * *

At a hearing on the preliminary injunction, the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV. See *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 282 F. Supp. 2d 1236, 1252 (NM 2002). The Government argued, however, that this burden did not violate RFRA, because applying the Controlled Substances Act in this case was the least restrictive means of advancing three compelling governmental interests: protecting the health and safety of UDV members, preventing the diversion of *hoasca* from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by

the United States and implemented by the Act. Feb. 21, 1971, [1979-1980], 32 U.S.T. 543, T. I. A. S. No. 9725. See 282 F. Supp. 2d, at 1252-1253.

* * * *

Before the District Court, the Government also asserted an interest in compliance with the 1971 United Nations Convention on Psychotropic Substances, Feb. 21, 1971, [1979-1980], 32 U.S.T. 543, T. I. A. S. No. 9725. The Convention, signed by the United States and implemented by the Controlled Substances Act, calls on signatories to prohibit the use of hallucinogens, including DMT. The Government argues that it has a compelling interest in meeting its international obligations by complying with the Convention.

The District Court rejected this interest because it found that the Convention does not cover *hoasca*. The court relied on the official commentary to the Convention, which notes that "Schedule I [of the Convention] does not list . . . natural hallucinogenic materials," and that "plants as such are not, and it is submitted are also not likely to be, listed in Schedule I, but only some products obtained from plants." U. N. Commentary on the Convention on Psychotropic Substances 387, 385 (1976). The court reasoned that *hoasca*, like the plants from which the tea is made, is sufficiently distinct from DMT itself to fall outside the treaty. See 282 F. Supp. 2d, at 1266-1269.

We do not agree. The Convention provides that "a preparation is subject to the same measures of control as the psychotropic substance which it contains," and defines "preparation" as "any solution or mixture, in whatever physical state, containing one or more psychotropic substances." *See* 32 U.S.T., at 546, Art. 1(f)(i); *id.*, at 551, Art. 3. *Hoasca* is a "solution or mixture" containing DMT; the fact that it is made by the simple process of brewing plants in water, as opposed to some more advanced method, does not change that. To the extent the commentary suggests plants themselves are not covered by the Convention, that is of no moment—the UDV seeks to import and use a tea brewed from plants, not the plants themselves, and the tea plainly qualifies as a "preparation" under the Convention.

The fact that *hoasca* is covered by the Convention, however, does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention, to the UDV's sacramental use of the tea. At the present stage, it suffices to observe that the Government did not even *submit* evidence addressing the international consequences of granting an exemption for the UDV. The Government simply submitted two affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs. See Declaration of Gary T. Sheridan (Jan. 24, 2001), App. G to App. to Pet. for Cert. 261a; Declaration of Robert E. Dalton (Jan. 24, 2001), App. H, *id.*, at 265a. We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough.

* * * *

The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

e. Drug interdiction assistance

On August 17, and October 16, 2006, President George W. Bush certified as to Colombia and Brazil that

> (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a

> minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

71 Fed. Reg. 51,975 (Sept. 1, 2006) and 71 Fed. Reg. 65,369 (Nov. 8, 2006), respectively. Under the statute, the President's certification is a prerequisite for providing U.S. assistance to certain aerial narcotics interdiction programs in which a foreign government may use lethal force against civil aircraft. *See Cumulative Digest 1991-1999* at 538-47.

4. Trafficking in Persons

a. Trafficking in persons reports

On June 5, 2006, the Department of State released its annual Department of State Trafficking in Persons Report. The introduction to the report notes developments in the report as follows:

> Every year we add to our knowledge of the trafficking phenomenon. In the 2004 Report, we used U.S. Government data that disaggregated transnational trafficking in persons by age and gender for the first time. This data shows that, of the estimated 600,000 to 800,000 men, women, and children trafficked across international borders each year, approximately 80 percent are women and girls, and up to 50 percent are minors. The data also demonstrated that the majority of transnational victims were trafficked into commercial sexual exploitation. With a focus on transnational trafficking in persons, however, these numbers do not include millions of victims around the world who are trafficked within their own national borders. The 2006 Report sheds new light on the alarming trafficking of people for purposes of slave labor, often in their own countries. This is a form of human trafficking that can be harder to identify and estimate than sex trafficking, yet

it may be much greater in size when we count domestic trafficking. It does not necessarily involve the same criminal networks profiting from transnational trafficking for sexual exploitation. More often, individuals are guilty of, for example, enslaving one domestic servant or hundreds of unpaid, forced workers at a factory.

A wide range of estimates exists on the scope and magnitude of modern-day slavery, both internal and transnational. The International Labor Organization (ILO)—the United Nations (UN) agency charged with addressing labor standards, employment, and social protection issues—estimates there are 12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time; other estimates range from 4 million to 27 million.

The text of the 2006 report and related materials are available at *www.state.gov/g/tip/rls/tiprpt/2006*.

On February 1, 2006, the Department submitted to Congress its interim assessment report pursuant to the 2003 Trafficking Victims Protection Reauthorization Act. The interim report provides an assessment "of the progress made by those countries placed on the Special Watch List in September 2005 to combat trafficking in persons (TIP). The evaluation period covers the six months since the release of the June 2005 annual report." *See www.state.gov/g/tip/rls/rpt/60487.htm*.

b. Presidential determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, Pub. L. No. 106-386, 114 Stat. 1464, 22 U.S.C. § 7107 (2000), the President annually makes one of four specified determinations with respect to "each foreign country whose government, according to [the annual report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant

efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)-(4).

On September 26, 2006, President Bush issued Presidential Determination No. 2006-25 with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons in a memorandum for the Secretary of State. 71 Fed. Reg. 64,431 (Nov. 1, 2006). The Presidential Determination is also available, together with the Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries," at *www.state.gov/g/tip/rls/prsrl/73440.htm*.

The memorandum of justification summarized the determinations made by the President and their effect, as excerpted below and included a separate discussion of each of the fourteen countries.

* * * *

The President has made determinations regarding the twelve countries placed on Tier 3 of the State Department's 2006 annual Report on Trafficking in Persons. The President has determined to sanction Burma, Cuba, the Democratic People's Republic of Korea (DPRK), Iran, Syria, Venezuela, and Zimbabwe. The United States will not provide funding for participation by officials or employees of the governments of Cuba, the DPRK, Iran, or Syria in educational and cultural exchange programs until such government complies with the Act's minimum standards to combat trafficking or makes significant efforts to do so. The United States will not provide certain non-humanitarian, non-trade-related assistance to the governments of Burma, Venezuela, or Zimbabwe, until such government complies with the Act's minimum standards to combat trafficking or makes significant efforts to do so. Furthermore, the President determined, consistent with the Act's waiver authority, that provision of certain assistance to the governments of Iran, Syria, Venezuela, and Zimbabwe, would promote the purposes of the Act or is otherwise in the national interest of the United States. The President also determined, consistent with the Act's waiver authority, that provision of all bilateral and multilateral assistance

to Saudi Arabia, Sudan, and Uzbekistan that otherwise would have been cut off would promote the purposes of the Act or is otherwise in the national interest of the United States.

The determinations also indicate the Secretary of State's subsequent compliance determinations regarding Belize and Laos. It is significant that two of the twelve Tier 3 countries took actions that averted the need for the President to make a determination regarding sanctions and waivers. Information highlighted in the Trafficking in Persons report and the possibility of sanctions, in conjunction with our diplomatic efforts, encouraged these countries' governments to take important measures against trafficking.

Section 110(d)(1)(B) of the Act interferes with the President's authority to direct foreign affairs. We, therefore, interpret it as precatory. Nonetheless, it is the policy of the United States that, consistent with the provisions of the Act, the U.S. Executive Director of each multilateral development bank, as defined in the Act, and of the International Monetary Fund will vote against, and use the Executive Director's best efforts to deny any loan or other utilization of the funds of the respective institution to the governments of Burma, Cuba, the Democratic People's Republic of Korea (DPRK), Iran, Syria, Venezuela, and Zimbabwe (with specific exceptions for Venezuela and Zimbabwe) for Fiscal Year 2007, until such a government complies with the minimum standards or makes significant efforts to bring itself into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act.

* * * *

5. Corruption

a. UN Convention Against Corruption

On October 30, 2006, the United States deposited its instrument of ratification to the UN Convention Against Corruption ("UNCAC"). The UNCAC, which entered into force internationally on December 14, 2005, entered into force for the United States on November 30, 2006. On June 21, 2006, the

Senate Foreign Relations Committee held a hearing on the treaty; testimony from Samuel Witten, Deputy Legal Adviser for the U.S. Department of State, is available at *www.state.gov/s/l/c8183.htm; see also* S. Ex. Rept.109-18 (2006), reporting the treaty to the Senate and recommending its approval. The Senate adopted a resolution of advice and consent to ratification on September 15, 2006, 152 CONG. REC. S9662 (Sept. 15, 2006). The resolution included reservations and declarations, as set forth below.

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO RESERVATIONS AND DECLARATIONS

The Senate advises and consents to the ratification of the United Nations Convention Against Corruption (hereinafter in this resolution referred to as the "Convention"), adopted by the United Nations General Assembly on October 31, 2003, and signed by the United States on December 9, 2003, at Merida, Mexico (T. Doc. 109096), subject to the reservations in section 2 and the declarations in section 3.

SECTION 2. RESERVATIONS

The advice and consent of the Senate under section 1 is subject to the following reservations, which shall be included in the United States instrument of ratification:

(1) The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as an important component of the legal regime within the United States for combating corruption and is broadly effective for this purpose. Federal criminal law does not apply where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest.

There are conceivable situations involving offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. Similarly, in the U.S. system, the states are responsible for preventive measures governing their own officials. While the states generally regulate their own affairs in a manner consistent with the obligations set forth in the chapter on preventive measures in the Convention, in some cases they may do so in a different manner. Accordingly, there may be situations where state and federal law will not be entirely adequate to satisfy an obligation in Chapters II and III of the Convention. The United States of America therefore reserves to the obligations set forth in the Convention to the extent they (1) address conduct that would fall within this narrow category of highly localized activity or (2) involve preventive measures not covered by federal law governing state and local officials. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other States Parties in accordance with the provisions of the Convention.

(2) The United States of America reserves the right not to apply in part the obligation set forth in Article 42, paragraph 1(b) with respect to the offenses established in accordance with the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in many circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States shall implement paragraph 1(b) to the extent provided for under its federal law.

SECTION 3. DECLARATIONS

(a) The advice and consent of the Senate under section 1 is subject to the following declaration:

> The United States of America declares that, in view of its reservations, current United States law, including the laws of the States of [the] United States, fulfills the obligations of the Convention for the United States. Accordingly, the United States

of America does not intend to enact new legislation to fulfill its obligations under the Convention.

(b) The advice and consent of the Senate under section 1 is subject to the following declarations, which shall be included in the United States instrument of ratification:

(1) In accordance with Article 66, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 66, paragraph 2.

(2) The United States declares that the provisions of the Convention (with the exception of Articles 44 and 46) are non-self-executing. None of the provisions of the Convention creates a private right of action.

A media note released by the Department of State on November 29, 2006, is excerpted below. The full text of the note is available at *www.state.gov/r/pa/prs/ps/2006/77067.htm*.

. . . UNCAC is quickly becoming a focal point for international anticorruption action. It is the most comprehensive anticorruption treaty ever developed, and will be the first international anticorruption agreement to be applied on a truly global level.

The United States was a leader in the two-year negotiations for UNCAC and has been actively promoting UNCAC as the cornerstone for regional multilateral anticorruption action, including, most recently, within the G-8, APEC, the UNDP-OECD Middle East Governance for Development Initiative, and the ministerial Global Forum for Fighting Corruption.

Parties to UNCAC commit to criminalize core corrupt conduct, take a wide variety of measures to prevent corruption from happening in the first instance, cooperate internationally on a law enforcement level, and implement measures that will facilitate international cooperation in asset recovery cases. More than 130 countries participated in negotiations for the Convention, which concluded in October 2003. UNCAC was opened for signature in December 2003 and entered into force on December 14, 2005. As of today, there are 80 parties to UNCAC, including the United States, and 140 signatories. The text of UNCAC can be found at: www.unodc.org/unodc/en/crime_convention_corruption.html

The Conference of States Parties to UNCAC will convene for the first time in Dead Sea, Jordan on December 10-14 to develop a process for reviewing UNCAC implementation and promoting technical assistance to support implementation. The State Department's Bureau for International Narcotics and Law Enforcement (INL) will lead the U.S. delegation.

The United States remains a leader in international anticorruption efforts. In addition to promoting implementation of UNCAC and assisting countries to take effective action against corruption, the United States is working to strengthen international resolve and cooperation to deny safe haven to kleptocrats and other egregiously corrupt public officials. This summer, the President released the National Strategy to Internationalize Efforts to Combat Kleptocracy, and the State Department and other agencies are working with G-8 and other partners to strengthen political will and promote law enforcement action against bribery and public corruption.

> At the first Conference of the States Parties ("COSP") to UNCAC, referred to above, held December 10-14 in Dead Sea, Jordan, the United States garnered support for several decisions to provide a foundation for effective implementation of the convention. Among other things, delegates agreed to approve immediate action to begin gathering information on how countries are implementing UNCAC. The parties also agreed on the necessity of creating a mechanism for reviewing implementation of UNCAC and to use a U.S.-developed self-assessment checklist as the model for soliciting and gathering such information over the next year. The United States also facilitated agreement on supporting activities, including a donor workshop in 2007 and expert seminars on asset recovery, and took a leading role in facilitating consensus on a decision related to the bribery of public international officials. Other formal COSP decisions included an appeal for States to expedite compliance with the mandatory criminalization provisions, the introduction of case study examination of prevention as an activity of the next COSP, and adoption of the provisional agenda for the second session focused on expert sessions on key issues.

b. National Strategy Against High-Level Corruption

As noted in a. *supra*, on August 10, 2006, President Bush released the National Strategy Against High-Level Corruption: Coordinating International Efforts to Combat Kleptocracy. In a press statement of that date, President Bush stated:

> . . . High-level corruption by senior government officials, or kleptocracy, is a grave and corrosive abuse of power and represents the most invidious type of public corruption. It threatens our national interest and violates our values. It impedes our efforts to promote freedom and democracy, end poverty, and combat international crime and terrorism. Kleptocracy is an obstacle to democratic progress, undermines faith in government institutions, and steals prosperity from the people. Promoting transparent, accountable governance is a critical component of our freedom agenda.

42 WEEKLY COMP. PRES. DOC. 1451 (Aug. 14, 2006). A fact sheet also issued on August 10, 2006, is excerpted below. The full text of the fact sheet is available at *www.whitehouse.gov/news/releases/2006/08/20060810-1.html*. The National Strategy Against High-Level Corruption is available at *www.state.gov/documents/organization/70333.pdf*.

* * * *

The President's National Strategy To Internationalize Efforts Against Kleptocracy

This New National Strategy Builds On The President's Commitment Made With The G-8 Leaders At Their Recent Summit In St. Petersburg. At the G-8 summit, President Bush committed to promote legal frameworks and a global financial system that will reduce the opportunities for kleptocracies to develop and to deny safe haven to corrupt officials, those who corrupt them, and the proceeds of corrupt activity.

- The Strategy Has As Its Foundation In The President's Proclamation, Made In January 2004, To Generally Deny Entry Into The United States Of Persons Engaged In Or Benefiting From Corruption.
- The Strategy Advances Many Of The Objectives In The National Security Strategy By Mobilizing The International Community To Confront Large-Scale Corruption By High-Level Foreign Public Officials And Target The Fruits Of Their Ill-Gotten Gains.
- The Strategy Reaffirms The President's Commitment To Ensure That Integrity And Transparency Triumph Over Corruption And Lawlessness Around The World, Expand The Circle Of Prosperity, And Extend America's Transformational Democratic Values To All Free And Open Societies.

Specifically, The Strategy Promotes Our Objectives By Committing To:

- Launch A Coalition Of International Financial Centers Committed To Denying Access And Financial Safe Haven To Kleptocrats. The United States Government will enhance its work with international financial partners, in the public and private sectors, to pinpoint best practices for identifying, tracing, freezing, and recovering assets illicitly acquired through kleptocracy. The U.S. will also work bilaterally and multilaterally to immobilize kleptocratic foreign public officials using financial and economic sanctions against them and their network of cronies.
- Vigorously Prosecute Foreign Corruption Offenses and Seize Illicitly Acquired Assets. In its continuing efforts against bribery of foreign officials, the United States Government will expand its capacity to investigate and prosecute criminal violations associated with high-level foreign official corruption and related money laundering, as well as to seize the proceeds of such crimes.
- Deny Physical Safe Haven. We will work closely with international partners to identify kleptocrats and those who corrupt them, and deny such persons entry and safe haven.

- Strengthen Multilateral Action Against Bribery. The United States will work with international partners to more vigorously investigate and prosecute those who pay or promise to pay bribes to public officials; to strengthen multilateral and national disciplines to stop bribery of foreign public officials; and to halt bribery of foreign political parties, party officials, and candidates for office.
- Facilitate And Reinforce Responsible Repatriation And Use. We will also work with our partners to develop and promote mechanisms that capture and dispose of recovered assets for the benefit of the citizens of countries victimized by high-level public corruption.
- Target And Internationalize Enhanced Capacity. The United States will target technical assistance and focus international attention on building capacity to detect, prosecute, and recover the proceeds of high-level public corruption, while helping build strong systems to promote responsible, accountable, and honest governance.

The President's Announcement Builds On Established U.S. Leadership In The International Fight Against Corruption. The U.S. actively supports development and implementation of effective anticorruption measures in various international bodies and conventions. In addition to the G-8, we have promoted strong anticorruption action in the:

- UN Convention Against Corruption
- OECD Anti-Bribery Convention and the OECD Working Group on Bribery
- Financial Action Task Force (FATF)
- Council of Europe Group of States Against Corruption (GRECO)
- OAS Mechanism for Implementing the Inter-American Convention Against Corruption
- Asia Pacific Economic Cooperation Forum's Anticorruption and Transparency (ACT) Initiative
- Broader Middle East and North Africa (BMENA) "Governance for Development in Arab States" (GfD) Initiative.

c. Inter-American Convention Against Corruption

In April 2006 the Department of State filed its sixth annual report to Congress on the Inter-American Convention Against Corruption. The reports are submitted pursuant to the Resolution of Advice and Consent to Ratification of the convention adopted by the Senate on July 27, 2000. *See Digest 2000* at 231-38. Excerpts below from the report describe progress in the OAS monitoring process under the convention. Appendix F to the report, "USAID Support Provided to Implement the Inter-American Convention against Corruption in 2005" provides a country-by-country review of USAID funding related to the convention. The full text of the report is available at *www.state.gov/p/inl/rls/rpt/67758.htm*.

. . . [T]he formal monitoring process (the Mechanism) was established by the May 2001 Report of Buenos Aires, attached as Appendix C, and consists of two parts: the Committee, responsible for technical analysis, and the Conference of the States Parties to the Mechanism, responsible for implementation oversight.

At the Special Summit of the Americas of Nuevo León in January 2004, the leaders of the hemisphere stated:

> The Inter-American Democratic Charter states that the peoples of the Americas have the right to democracy and that their governments have the obligation to promote and defend it, and it establishes that transparency in government activities, probity, and responsibility in public management are key components of the exercise of democracy. We will therefore increase our cooperation within the framework of the Inter-American Convention against Corruption, particularly by strengthening its follow-up mechanism. We charge the upcoming meeting of the Conference of States Parties to the follow-up mechanism of the Convention with proposing specific measures to strengthen this mechanism.

The first meeting of the Conference of the States Parties to the Mechanism took place on April 1-2, 2004, in Washington, D.C. . . .

The principal recommendations included measures to strengthen the funding of the Mechanism, strengthen the Technical Secretariat, enhance the participation of civil society in Mechanism activities, and accelerate the work of the Committee. The next meeting of the Conference of the States Parties will be scheduled for the last half of 2006.

As of December 31, 2005, there has been considerable progress in the monitoring process. The Committee has produced a total of 23 assessment reports: Argentina, The Bahamas, Bolivia, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Trinidad and Tobago, the United States, Uruguay, and Venezuela. Twenty of these reports have to date been made publicly available on the OAS website. Twenty-three countries – Argentina, The Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago, the United States, Uruguay, and Venezuela – have made their answers to the Committee's questionnaire publicly available via the OAS website. Web addresses to access these documents can be found in Appendix E.

In response to the recommendations of the Conference of the States Parties, the Committee accelerated its review schedule by reviewing 12 countries annually rather than eight. As a result, the first round evaluations are expected to be completed at the Committee's ninth meeting in March 2006. In an effort to launch the second round of evaluation as soon as possible after the conclusion of the first round, the Committee, at its eighth meeting in September 2005, selected the following topics for the second round of evaluation: government hiring and procurement (Article III, Sec. 5), whistleblower protections (Article III, Sec. 8), and criminal acts of corruption (Article VI). The Committee plans to have the structure, methodology and questionnaire for the second phase of review approved at its ninth meeting.

* * * *

6. Cybercrime

On September 29, 2006, the United States deposited its instrument of ratification and became a party to the Council of Europe Convention on Cybercrime. *See* Department of State fact sheet available at *www.state.gov/r/pa/prs/ps/2006/73354.htm*. *See also* S. Exec. Rpt. 109-6 (2005) and S. Treaty Doc. No. 108-11 (2003) transmitting the treaty from the President to the Senate, discussed in *Digest 2003* at 191-207. The convention entered into force for the United States on January 1, 2007. The text of the convention is also available at *http://conventions.coe.int/Treaty/en/Treaties/Htm/185.htm*. On August 3, 2006, the Senate adopted a resolution granting advice and consent to ratification subject to certain reservations and declarations as set forth below. 152 CONG. REC. S8901.

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO RESERVATIONS AND DECLARATIONS

The Senate advises and consents to the ratification of the Council of Europe Convention on Cybercrime ("the Convention"), signed by the United States on November 23, 2001 (T. Doc. 108 11), subject to the reservations of section 2, and the declarations of section 3.

SECTION 2. RESERVATIONS

The advice and consent of the Senate under section 1 is subject to the following reservations, which shall be included in the United States instrument of ratification:

(1) The United States of America, pursuant to Articles 4 and 42, reserves the right to require that the conduct result in serious harm, which shall be determined in accordance with applicable United States federal law.

(2) The United States of America, pursuant to Articles 6 and 42, reserves the right not to apply paragraphs (1)(a)(i) and (1)(b) of

Article 6 ("Misuse of devices") with respect to devices designed or adapted primarily for the purpose of committing the offenses established in Article 4 ("Data interference") and Article 5 ("System interference").

(3) The United States of America, pursuant to Articles 9 and 42, reserves the right to apply paragraphs (2)(b) and (c) of Article 9 only to the extent consistent with the Constitution of the United States as interpreted by the United States and as provided for under its federal law, which includes, for example, crimes of distribution of material considered to be obscene under applicable United States standards.

(4) The United States of America, pursuant to Articles 10 and 42, reserves the right to impose other effective remedies in lieu of criminal liability under paragraphs 1 and 2 of Article 10 ("Offenses related to infringement of copyright and related rights") with respect to infringements of certain rental rights to the extent the criminalization of such infringements is not required pursuant to the obligations the United States has undertaken under the agreements referenced in paragraphs 1 and 2.

(5) The United States of America, pursuant to Articles 22 and 42, reserves the right not to apply in part paragraphs (l)(b), (c) and (d) of Article 22 ("Jurisdiction"). The United States does not provide for plenary jurisdiction over offenses that are committed outside its territory by its citizens or on board ships flying its flag or aircraft registered under its laws. However, United States law does provide for jurisdiction over a number of offenses to be established under the Convention that are committed abroad by United States nationals in circumstances implicating particular federal interests, as well as over a number of such offenses committed on board United States-flagged ships or aircraft registered under United States law. Accordingly, the United States will implement paragraph (1)(b), (c) and (d) to the extent provided for under its federal law,

(6) The United States of America, pursuant to Articles 41and 42, reserves the right to assume obligations under Chapter II of the Convention in a manner consistent with its fundamental principles of federalism.

SECTION 3. DECLARATIONS

(1) The advice and consent of the Senate under section 1 is subject to the following declarations, which shall be

included in the United States instrument of ratification:

(a) The United States of America declares, pursuant to Articles 2 and 40, that under United States law, the offense set forth in Article 2 ("Illegal access") includes an additional requirement of intent to obtain computer data.

(b) The United States of America declares, pursuant to Articles 6 and 40, that under United States law, the offense set forth in paragraph (1)(b) of Article 6 ("Misuse of devices") includes a requirement that a minimum number of items be possessed. The minimum number shall be the same as that provided for by applicable United States federal law.

(c) The United States of America declares, pursuant to Articles 7 and 40, that under United States law, the offense set forth in Article 7 ("Computer-related forgery") includes a requirement of intent to defraud.

(d) The United States of America declares, pursuant to Articles 27 and 40, that requests made to the United States of America under paragraph 9(e) of Article 27 ("Procedures pertaining to mutual assistance requests in the absence of applicable international agreements") are to be addressed to its central authority for mutual assistance.

(2) The advice and consent of the Senate under section 1 is also subject to the following declaration:

The United States of America declares that, in view of its reservation pursuant to Article 41 of the Convention, current United States federal law fulfills the obligations of Chapter II of the Convention for the United States. Accordingly, the United States does not intend to enact new legislation to fulfill its obligations under Chapter II.

7. Money Laundering

a. Identification of jurisdictions of primary concern

Part II of the annual International Narcotics Control Strategy Report for 2005, available at *www.state.gov/p/inl/rls/nrcrpt/2006/vol2/html*, addresses money laundering and financial crimes. It reports on U.S. review of 200 jurisdictions, categorizing each under one of three headings: Jurisdictions

of Primary Concern, Jurisdictions of Concern, and Other Jurisdictions Monitored. The Major Money Laundering Countries section of Part II explains the terms "Jurisdictions of Primary Concern" and "major money laundering countries" as follows:

> The "Jurisdictions of Primary Concern" are those jurisdictions that are identified pursuant to the INCSR reporting requirements as "major money laundering countries." A major money laundering country is defined by statute as one "whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking." However, the complex nature of money laundering transactions today makes it difficult in many cases to distinguish the proceeds of narcotics trafficking from the proceeds of other serious crime. Moreover, financial institutions engaging in transactions involving significant amounts of proceeds of other serious crime are vulnerable to narcotics-related money laundering. The category "Jurisdiction of Primary Concern" recognizes this relationship by including all countries and other jurisdictions whose financial institutions engage in transactions involving significant amounts of proceeds from all serious crime. Thus, the focus of analysis in considering whether a country or jurisdiction should be included in this category is on the significance of the amount of proceeds laundered, not of the anti-money laundering measures taken. This is a different approach taken than that of the FATF Non-Cooperative Countries and Territories (NCCT) exercise, which focuses on a jurisdiction's compliance with stated criteria regarding its legal and regulatory framework, international cooperation, and resource allocations.

The report listed 58 countries and jurisdictions* under the primary concern heading for 2005, including the United States.

* The term "jurisdiction" is used to refer to entities warranting separate discussion and evaluation because of one or all of the following: lack of recognition as a separate sovereign; a subsovereign entity geographically separate from the higher sovereign; or a subsovereign entity whose distinct political or statutory regime warrants separate treatment from the higher sovereign.

03-Cummins-Chap03.indd 242 10/22/07 11:34:05 PM

For 2005 three countries moved up to the primary concern column: Afghanistan, Guatemala, and St. Kitts and Nevis; five countries moved up to the concern column: Algeria, Angola, Guyana, Laos, and Zimbabwe; and Nauru moved down from the concern column to the monitored column.

Volume II includes country reports for jurisdictions listed under the primary concern and concern headings. For those under the monitored column, country reports are provided only for jurisdictions that have received training or technical assistance funded directly or indirectly by the Department of State Bureau of International Narcotics and Law Enforcement in 2005.

b. Imposition of sanctions on foreign financial institutions

(1) Final rule: Commercial Bank of Syria

On March 15, 2006, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") published a final rule "imposing the fifth special measure (31 U.S.C. § 5318A(b) (5)) against Commercial Bank of Syria," including its subsidiary Syrian Lebanese Commercial Bank. 71 Fed. Reg. 13,260 (Mar. 15, 2006). Excerpts below from the final rule, effective April 14, 2006, provide background and explanation for the imposition of sanctions in this case (most footnotes omitted).

* * * *

I. Background

A. Statutory Provisions

Section 311 of the USA PATRIOT Act [Pub. L. No. 107–56, 115 Stat. 272, 31 U.S.C. § 5318A (2001)] added section 5318A to the Bank Secrecy Act, granting the Secretary the authority, after finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transactions, or type of account is of "primary money laundering concern," to require domestic financial institutions and domestic financial agencies to take certain "special measures" against the primary money laundering concern. . . .

Taken as a whole, section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options give us the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money - laundering threats and allow us to take steps to protect the U.S. financial system. Through the imposition of various special measures, we can gain more information about the concerned jurisdictions, institutions, transactions, and accounts; monitor more effectively the respective jurisdictions, institutions, transactions, and accounts; and ultimately protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required by the Bank Secrecy Act to consult with both the Secretary of State and the Attorney General.

In addition to these consultations, when finding that a foreign financial institution is of primary money laundering concern, the Secretary is required by section 311 to consider "such information as [we] determine to be relevant, including the following potentially relevant factors:"

> The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
>
> The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
>
> The extent to which such action is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of the Bank Secrecy Act continue to be fulfilled, and to guard against international money laundering and other financial crimes.

If we determine that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, we must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed, individually, or

jointly, in any combination, and in any sequence. In the imposition of special measures, . . . [s]ection 311 requires us to consult with other appropriate Federal agencies and parties and to consider the following specific factors:

> Whether similar action has been or is being taken by other nations or multilateral groups;
>
> Whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
>
> The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular institution; and
>
> The effect of the action on U.S. national security and foreign policy.

* * * *

II. The 2004 Finding and Subsequent Developments

A. The 2004 Finding

In May 2004, the Secretary, through the Director of the Financial Crimes Enforcement Network, found that reasonable grounds exist for concluding that Commercial Bank of Syria, a Syrian government-owned bank, is a financial institution of primary money laundering concern. This finding was published in the notice of proposed rulemaking, which proposed prohibiting U.S. financial institutions from, directly or indirectly, opening and maintaining correspondent accounts for Commercial Bank of Syria, and any of its branches, offices, and subsidiaries, pursuant to the authority under 31 U.S.C. 5318A. [69 Fed. Reg. 28,098 (May 18, 2004).] The notice of proposed rulemaking outlined the various factors supporting the finding and proposed prohibition. In finding Commercial Bank of Syria to be of primary money laundering concern, we determined that:

> Commercial Bank of Syria was used by criminals to facilitate or promote money laundering. In particular, we determined Commercial Bank of Syria had been used as a conduit for the laundering of proceeds generated from the illicit sale of Iraqi

oil and had been used by terrorists or persons associated with terrorist organizations

Any legitimate business use of Commercial Bank of Syria was significantly outweighed by its use to promote or facilitate money laundering and other financial crimes.

The finding and proposed special measure would prevent suspect accountholders at Commercial Bank of Syria from accessing the U.S. financial system to facilitate money laundering and would bring criminal conduct occurring at or through Commercial Bank of Syria to the attention of the international financial community and thus serve the purposes of the Bank Secrecy Act.

We also stated in our finding that Commercial Bank of Syria is licensed in Syria, a jurisdiction with very limited money laundering controls. Finally, in the notice of proposed rulemaking containing our finding, we further stated that Commercial Bank of Syria, as a financial entity under the control of a designated State Sponsor of Terrorism, provides cause for real concern about terrorist financing and money laundering activities.

B. Subsequent Developments

* * * *

. . . Syria has taken certain steps to develop an anti-money laundering regime, although these steps are not sufficient to address our concerns about money laundering and terrorist financing issues within Commercial Bank of Syria. In response to international pressure to improve its anti-money laundering regime, Syria passed Decree 33 in May 2005, which strengthened an existing Anti-Money Laundering Commission (the "Commission") and laid the foundation for the development of a financial intelligence unit. . . . Recent legislation has also provided the Central Bank of Syria, the entity that issues the national currency, new authority to oversee the banking sector and investigate financial crimes. Finally, Syria is working on integrating its anti-money laundering efforts with other countries in the Middle East and North Africa Financial Action Task Force ("MENA FATF"). Syria will host a team of assessors from the MENA FATF in early 2006, which will assess its progress in developing and implementing an effective anti-money laundering regime.

03-Cummins-Chap03.indd 246 10/22/07 11:34:05 PM

Despite these recent enhancements, there remain significant jurisdictional anti-money laundering vulnerabilities that have not been addressed by necessary legislation or other governmental action. Some of these vulnerabilities include the lack of regulation for hawaladars,[14] the failure to address cash smuggling and other criminal movement across the country's porous borders and the rampant corruption among Syria's political and business elite. In addition, Syrian law does not establish terrorist financing as a predicate offense for money laundering. Furthermore, Syria's free trade zones provide significant opportunities for laundering the proceeds of criminal activities because the Syrian General Directorate of Customs does not have effective oversight procedures to monitor goods that move through the zones. Finally, Syria faces serious ongoing challenges in implementing its anti-money laundering regime. Syria has failed to issue implementing rules for Decree 33, making adequate implementation and enforcement of the law questionable. Syria does not appear to have taken any significant regulatory, law enforcement or prosecutorial action with respect to any money laundering or terrorist financing activity in Syria, despite the terrorist financing and money laundering concerns associated with Commercial Bank of Syria as identified in our May 2004 finding.

These jurisdictional money laundering and terrorist financing vulnerabilities are exacerbated by Syria's ongoing support for terrorist activity. Syria has been designated by the U.S. Government as a State Sponsor of Terrorism since 1979. As of 2006, the Syrian Government continued to provide material support to Lebanese Hizballah and Palestinian terrorist groups. HAMAS, Palestinian Islamic Jihad (PIJ), and the Popular Front for the Liberation of Palestine (PFLP), among others, continue to maintain offices in Damascus, from which their members direct public relations and fundraising activities and provide guidance to terrorist operatives and fundraisers in the West Bank, Gaza, and across the region. For example, according to a significant volume of information available to the U.S. Government, PIJ leadership in Damascus,

[14] Hawala is an alternative or parallel trust-based remittance system. It exists and operates outside of, or parallel to 'traditional' banking or financial channels. The person who operates a hawala is commonly referred to as a hawaladar.

Syria controls all PIJ officials, activists and terrorists in the West Bank and Gaza. Syria-based PIJ leadership was implicated in the February 2005 terrorist attack in Tel Aviv, Israel that killed five and wounded over 50.

As late as 2005, Syrian Military Intelligence (SMI) official Assef Shawkat met with terrorist leaders Hassan Nasrallah of Hizballah, Ahmed Jibril of Popular Front for the Liberation of Palestine, and Abdullah Ramadan Shallah of Palestinian Islamic Jihad, in addition to Hamas officials, to discuss coordination and cooperation with the Syrian government. Shawkat managed a branch of SMI charged with overseeing liaison relations with major terrorist groups resident in Damascus. In January 2006, the Syrian Government facilitated a meeting in Damascus between Iranian government officials and several designated terrorist leaders, including, Abdullah Ramadan Shallah, Ahmed Jibril, Hassan Nasrallah, and Khaled Mishal of Hamas. The Syrian Government also continues to permit Iran to use Damascus as transshipment point for re-supplying Lebanese Hizballah in Lebanon.

These ongoing terrorist activities supported by Syria as a designated State Sponsor of Terrorism, coupled with the continuing jurisdictional vulnerabilities associated with Syria's weak money laundering and terrorist financing controls, continue to be directly relevant to our 2004 finding that Commercial Bank of Syria is of primary money laundering concern. As stated above, Commercial Bank of Syria is a Syrian government-owned and controlled bank. As such, Commercial Bank of Syria presents a direct and ongoing opportunity for Syrian government to continue to support and finance terrorist activity. This risk, in addition to the uncontested and ongoing money laundering and terrorist financing concerns associated with Commercial Bank of Syria as described in our May 2004 finding, further substantiates our belief that Commercial Bank of Syria is of primary money laundering concern. Accordingly, our finding remains that Commercial Bank of Syria is a financial institution of primary money laundering concern.

III. Imposition of the Fifth Special Measure

Consistent with the finding that Commercial Bank of Syria is a financial institution of primary money laundering concern, and

based on additional consultations with required Federal agencies and departments and consideration of additional relevant factors, including comments received for the proposed rule, we are imposing the special measure authorized by 31 U.S.C. 5318A(b)(5) with regard to Commercial Bank of Syria. That special measure authorizes the prohibition of, or the imposition of conditions upon, the opening or maintaining of correspondent or payable-through accounts by any domestic financial institution or domestic financial agency for, or on behalf of, a foreign financial institution found to be of primary money laundering concern. A discussion of the additional section 311 factors [enumerated above and] relevant to the imposition of this particular special measure follows.

* * * *

(2) Final rule: VEF Banka

On July 13, 2006, the Department of the Treasury, FinCEN, imposed the fifth special measure against VEF Banka, headquartered in Riga, Latvia, effective August 14, 2006. 71 Fed. Reg. 39,554 (July 13, 2006). Excerpts below from the final rule explain the applicability of the sanction to VEF Banka ("VEF") (footnotes omitted).

---

* * * *

I. Background

B. VEF

. . . VEF is one of the smallest of Latvia's 23 banks, and in 2004 was reported to have approximately $80 million in assets and 87 employees. . . . VEF offers corporate and private banking services, issues a variety of credit cards for non-Latvians, and provides currency exchange through Internet banking services, i.e., virtual currencies. In addition, according to VEF's financial statements, VEF maintains correspondent accounts in countries worldwide, but currently reports none in the United States. However, many of the foreign financial institutions from which VEF obtains financial services in turn maintain correspondent accounts with financial

institutions in the United States. Accordingly, it appears that VEF may still have indirect access to the U.S. financial system.

II. The 2005 Finding and Subsequent Developments

A. The 2005 Finding

Based upon review and analysis of pertinent information, consultations with relevant Federal agencies and parties, and after consideration of the factors enumerated in section 311, in April 2005 the Secretary, through his delegate, the Director of the Financial Crimes Enforcement Network, found that reasonable grounds exist for concluding that VEF is a financial institution of primary money laundering concern. This finding was published in a notice of proposed rulemaking, which proposed prohibiting covered financial institutions from, directly or indirectly, opening or maintaining correspondent accounts in the United States for VEF or any of its branches, offices, or subsidiaries, pursuant to the authority under 31 U.S.C. 5318A. [70 Fed. Reg. 21,369 (April 26, 2005).]

The notice of proposed rulemaking outlined the various factors supporting the finding and proposed prohibition. In finding VEF to be of primary money laundering concern, we determined that:

> VEF was used by criminals to facilitate or promote money laundering. In particular, we determined that VEF was an important banking resource for illicit shell companies and financial fraud rings, allowing criminals to pursue illegal financial activities. VEF permitted ATM withdrawals in significant amounts, an essential component to the execution of large financial fraud schemes typically associated with carding networks.
>
> Any legitimate business use of VEF appeared to be significantly outweighed by its use to promote or facilitate money laundering and other financial crimes.
>
> A finding that VEF is of primary money laundering concern and prohibiting the maintenance of correspondent accounts for that institution would prevent suspect accountholders at VEF from accessing the U.S. financial system to facilitate money laundering and would bring criminal conduct occurring at or through

> VEF to the attention of the international financial community and thus serve the purposes of the Bank Secrecy Act as well as guard against international money laundering and other financial crime.

We determined, based on a variety of sources, that VEF Bank has been used to facilitate or promote money laundering based in part on its lax identification and verification of accountholders and on its weak internal controls. In addition, the proceeds of alleged illicit activity have been transferred to or through accounts held by VEF Bank at covered financial institutions.

B. Jurisdictional Developments

Latvia's geographical position, situated by the Baltic Sea and bordering Russia, Estonia, Belarus, and Lithuania, makes it an attractive transit country for both legitimate and illegitimate trade. Sources of illegitimate trade include counterfeiting, arms trafficking, contraband smuggling, and other crimes. It is believed that most of Latvia's narcotics trafficking is conducted by organized crime groups that began with cigarette and alcohol smuggling and then progressed to narcotics. Latvian authorities recently have sought tighter legislative controls designed to fight money laundering and other financial crime. However, Latvia's role as a regional financial center, the number of commercial banks (23), and those banks' sizeable non-resident deposit base continue to make it vulnerable to money laundering.

Latvia has taken a number of significant steps to address the reported money laundering risks and corruption highlighted in the notice of proposed rulemaking. The Parliament of Latvia recently passed a new law, On the Declaration of Cash on the State Border, which will go into effect on July 1, 2006. The law is aimed at preventing money laundering consistent with the United Nations Convention Against Transnational Organized Crime and the European Union draft regulation on the control of cash leaving and entering the European Community. In 2005, Latvian law was amended to broaden supervisory authority to revoke banking licenses and to allow enforcement agencies greater access to bank account information. The amendments also provide for fines of between 5,000 and 100,000 LATS (equivalent to over $8,687.50

and over $173,750.00, respectively) against banks in violation of the anti-money laundering laws; include a definition of and procedures for determining who qualifies as a "true beneficiary"; and introduce criminal liability for providing false information to banks. Additionally, Latvia has: Banned the establishment of shell banks; clarified the authority of Latvian financial institutions to demand customer disclosure regarding the source of funds; and allowed for the sharing of information between financial institutions on suspicious activities.

In terms of implementation, the Latvian authorities have made strides in strengthening their anti- money laundering regulation and supervision and in developing more robust anti-money laundering examination procedures. To ensure proper protection of Latvia's financial sector, authorities will need to continue their efforts to effectively implement and enforce their strengthened anti-money laundering regime.

C. VEF's Subsequent Developments

We acknowledge that VEF has taken steps to address many of the money laundering concerns that we previously identified. For example, the bank revised its policies and procedures, including training procedures; created an Anti-Money Laundering Manual; closed approximately 600 questionable accounts; changed some of its management personnel; and retained the services of an independent international accounting firm to identify weaknesses in its anti-money laundering program and to assist the bank in its goal of reaching a best practices standard for its anti-money laundering program and controls.

Despite the steps VEF has taken, based on a variety of sources including classified information, we continue to have serious concerns about the commitment of the bank to implement its revised policies and procedures. Specifically, we have continued concern with reported links between the bank's ownership and organized crime groups that reportedly facilitate money laundering. Accordingly, we find that VEF continues to be a financial institution of primary money laundering concern.

* * * *

(3) Withdrawal of finding: Multibanka

Also on July 13, 2006, the Department of the Treasury, FinCEN, withdrew a finding of primary money laundering concern and notice of proposed rulemaking against Multibanka, a commercial bank headquartered in Riga, Latvia. 71 Fed. Reg. 39,606 (July 13, 2006); *see Digest 2005 at 176-80.* Noting the jurisdictional developments in Latvia discussed in VEF Banka *supra*, FinCEN concluded:

> We believe that Multibanka has been forthcoming in addressing the concerns that we identified in the notice of proposed rulemaking and has instituted measures to guard against money laundering abuses. The bank, through its counsel, initiated meetings with us in May and October 2005, with the intent to demonstrate the remedial measures taken. We permitted the bank to submit additional documentation to demonstrate its continued efforts and the bank has provided copies of its revised policies, procedures, and internal controls. Multibanka has significantly improved its anti-money laundering policies, procedures, and internal controls, has enhanced its organizational structure, and has strengthened its accountholder identification and verification requirements. We believe that the bank's cumulative efforts demonstrate its continuing commitment to fighting money laundering and other financial crimes. If a financial institution that is the object of a proposed section 311 special measure is determined to no longer be of primary money laundering concern, we have authority to withdraw the finding and to withdraw any related proposal to impose a special measure. In light of Multibanka's significant remedial measures, described above, to address deficiencies in its anti-money laundering program and internal controls, particularly the bank's attempts to review its accounts to focus on legitimate business customers, we believe that the risk of criminals using Multibanka to facilitate or promote money laundering has decreased.

c. Statutory amendment

In October 2006 § 311 of the PATRIOT Act, 31 U.S.C. § 5318A, was amended to include financial transactions and money laundering activities by persons or entities engaged in proliferation of weapons of mass destruction or missiles as factors to be considered by the Secretary of the Treasury in determining whether to find that either an entire jurisdiction or a financial institution within a jurisdiction is of money laundering concern. Iran Freedom Support Act, § 501, Pub. L. No. 109-293, 120 Stat. 1344 (2006).

C. INTERNATIONAL CRIMINAL TRIBUNALS AND RELATED ISSUES

1. Ad Hoc Criminal Tribunals and Related Issues

a. Overview

On May 11, 2006, Department of State Legal Adviser John B. Bellinger, III, participated in a conference entitled "International Courts and Tribunals and the Rule of Law," held at the George Washington University School of Law. Excerpts follow from Mr. Bellinger's remarks on criminal tribunals*; see also* Mr. Bellinger's remarks to the 29th Round Table on Current Problems of International Humanitarian Law in San Remo, Italy, concerning international terrorists. The full texts of both speeches are available at *www.state.gov/s/l/c8183.htm*. Excerpts from the May 11 presentation addressing the role of tribunals in resolution of state-to-state disputes are provided in Chapter 17.A.1.

* * * *

Criminal Tribunals

. . . Consistent with our overall approach on rule of law issues, we favor solutions that will best establish and empower local institutions

for ensuring criminal justice and that will, in turn, inspire local ownership of the results. For this reason, we believe that domestic solutions for criminal justice are preferable to international solutions whenever possible. Helping states develop strong judicial institutions is a central part of our strategy for promoting the rule of law.

At the same time, the United States has often supported the use of international or hybrid courts to investigate and prosecute crimes that would be difficult to address through domestic courts. In some cases this is because domestic courts lack the capacity or resources to address particular crimes. In other cases, the involvement of international actors may help increase domestic actors' confidence in the objectivity and legitimacy of criminal processes, especially where domestic societies may be deeply divided along political, ethnic, or other lines.

For example, in the cases of the former Yugoslavia and Rwanda, we supported the UN Security Council's creation of international criminal tribunals as a means of ensuring accountability for the terrible crimes committed during the conflicts and aiding the process of post-conflict reconciliation. These tribunals are wholly international in character: they are subsidiary organs of the Security Council; they are made up of judges elected by the United Nations; and they have jurisdiction over crimes arising under international law. The UN Security Council resolutions creating the tribunals require all states to cooperate fully with the tribunals, and the United States has done so since their inception. We provide about one quarter of the total cost of each tribunal—last year we contributed $35.5M for ICTR and $43.7M for ICTY, and by year's end our total contributions to the two tribunals since their inception will have exceeded half a billion dollars. And we do far more to show our support than just writing checks. The United States also cooperates with requests for information and access to witnesses from both the prosecution and defense to help ensure full and fair trials. Our political support has been strong, too. The United States has consistently pressured states to cooperate with the tribunals and to help the tribunals secure custody of indictees, including, in the case of Serbia, through withholding financial assistance. Finally, last June, Secretary Rice, within months of

being sworn in, made a point of meeting with the presidents and chief prosecutors of the ICTY and the ICTR to confer with them on the progress and challenges of the Tribunals and to express her strong support for their work.

Although we have strongly supported the ICTY and the ICTR, we have expressed concerns about their cost—which, together, amounts to over $2 billion to date—and their efficiency of operations. As a result, we have urged the ICTY and the ICTR to ensure that they adhere to their Security-Council endorsed completion strategies of completing trials of first instance in 2008 and appeals in 2010. We recognize that this is a daunting endeavor, and needs to be balanced with protecting the rights of the accused, but timely and effective trials are an important component of justice.

The international community followed a somewhat different model in creating the Special Court for Sierra Leone than it did for ICTY and ICTR. Instead of being created by a Security Council resolution, the Special Court was established pursuant to an agreement between the UN and the Government of Sierra Leone. The Special Court has its seat in Sierra Leone, and includes judges appointed by both the Government of Sierra Leone and the UN Secretary General, and its statute provides for the prosecution of crimes under both Sierra Leonean and international law. These elements provide a greater degree of local involvement than in the case of ICTY and ICTR. This hybrid model, combining local and international features, may be a promising model for future cases.

As with ICTY and ICTR, the United States has provided extensive financial, technical and political support to the Special Court for Sierra Leone. Most recently, and perhaps most importantly, the United States made substantial efforts at the highest levels of our government to press for the transfer of former Liberian President Charles Taylor to the Special Court. This included efforts to persuade the Government of Nigeria, where Taylor had previously been granted exile, to facilitate his transfer, and our leading role in securing passage of a UN Security Council resolution allowing UN peacekeepers in Liberia to apprehend Taylor should he be found in Liberia and transfer him to the Special Court. Arrangements have largely been concluded to transfer him to The Hague, where the

Special Court would hold his trial in facilities leased from the ICC, with legal proceedings exclusively under the jurisdiction of the Special Court. The major obstacle to his transfer is the identification of a country to imprison him should he be found guilty. Consultations are taking place in that regard, and we hope that a country, perhaps one that has not done much otherwise to support the Special Court, will soon show its commitment to international justice and agree to enforce any sentence that may be handed down.

Another matter currently unfolding is the effort by the United States and others to assist Lebanon to bring to justice those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri. The UN Security Council has passed a resolution requesting the UN Secretary General to negotiate an agreement with the Government of Lebanon for the establishment of a tribunal of an international character to address these matters. The United States, France and the United Kingdom have taken a leading role in the Council to help Lebanon see justice done in a volatile environment in the region. The Hariri assassination case demonstrates that there is no off-the-shelf solution to the complex issues raised by international criminal justice, and that a pragmatic approach—along with considerable effort, both in public and behind the scenes—may be required to adapt existing models to the needs of a particular situation.

ICC

The United States does not support every example of international criminal tribunals. Our concerns about the International Criminal Court are well-known. While we share common goals with many ICC supporters, we disagree with the ICC's method for achieving accountability. From the U.S. perspective, the ICC lacks an adequate system of checks and balances, and the Rome Statute gives the ICC prosecutor the ability to initiate cases without appropriate oversight by the UN Security Council. This creates a risk of politicized prosecutions, and infringes on the Security Council's primary role under the UN Charter for the maintenance of international peace and security. In this

connection, we object as a matter of principle to the ICC's claim of jurisdiction over persons from states who have not become parties to the Rome Statute.

The United States has nonetheless demonstrated that our differences over the ICC will not prevent us from finding ways to work with ICC supporters to bring to justice perpetrators of genocide, war crimes and crimes against humanity. For example, we accepted adoption of the UN Security Council resolution referring the situation in Darfur to the ICC because we felt it was important for the international community to speak with one voice on accountability there. And we have expressed our willingness for the Special Court for Sierra Leone to hold the trial of Charles Taylor in the ICC facilities in The Hague in order to minimize the risk that his trial could pose to security and stability in West Africa.

As we have said many times, we respect the decisions of states that have become parties to the Rome Statute; we ask in return that other states respect our decision not to do so and not to subject U.S. persons to the ICC's jurisdiction. We share with parties to the Rome Statute a commitment to preventing genocide, war crimes, and crimes against humanity, and to ensuring accountability when they occur. We believe that divisiveness over the ICC distracts from our ability to pursue these common goals, and hope that supporters of the Rome Statute will join us in constructive efforts to advance our shared values. Javier Solana said it well when he stated last year that there needs to be a "modus vivendi" between supporters of the ICC and the United States.

The contentious debate over the ICC has obscured the enormous and indispensable contributions that the United States has made in matters of international criminal justice. Our experience has been that establishing a tribunal, whether by Security Council resolution, treaty, or domestic statute, is only a first step. A state's real commitment lies in its efforts to ensure that wrongdoers are apprehended, that tribunals have adequate resources, and that full and fair trials are actually conducted. By these measures, the United States is certainly among the world's leaders in promoting international criminal justice.

IHT

This also explains why the United States has been so disappointed at the lack of international support for the Iraq High Tribunal. . . . *

Conclusion

The U.S. position on the Iraqi High Tribunal illustrates a more general theme I would like to address in closing. Like the rest of the world, we value appropriate international tribunals because they serve grander ambitions – resolving disputes and promoting international criminal justice. There is also a broad agreement, I believe, that international courts and tribunals are one tool among many to achieve these important ends. Maximizing their potential requires us to identify both the situations in which international courts and tribunals can play a role and the type of tribunal appropriate to each situation. It also requires courts and tribunals to be sensitive to the role they play in relations among states, and to tailor their approaches to best meet the needs of states and of the international system. The United States has been and will continue to be a strong advocate for accountability and a strong supporter of efforts to bring peace and rule of law to countries whose populations have suffered grave atrocities. In pursuit of the accountability, we will endeavor to preserve an appropriate role for sovereign states in ensuring justice; craft responses to local conditions and needs; and keep the door open to a variety of accountability options, in order to incorporate lessons learned, address new developments, and adapt to new challenges.

See also statement of Ambassador John Bolton to the Security Council thematic debate on strengthening international law: Rule of Law and the Maintenance of International Peace and Security, available at *www.un.int/usa/06_136.htm.*

b. International Criminal Tribunal for the former Yugoslavia

On May 12, 2006, the Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia ("ICTY") released

* Editor's note: *See* 1.b. below.

the Decision on Request of the United States of America for Review in *Prosecutor v. Ojdanić*, Case No. IT-05-87-AR108*bis*.2. The decision reversed a trial chamber decision and set aside the trial chamber's grant of a 54bis order compelling the production of sensitive intelligence information.

The full text of the decision, excerpted below (footnotes omitted), is available at *www.state.gov/s/l/c8183.htm*.

* * * *

2. On 27 June 2005, Dragoljub Ojdanić ("Ojdanić") filed "General Ojdanić's Second Application for Orders to NATO and States for Production of Information" before Trial Chamber III ("Application"). After holding an oral hearing on the Application on 4 October 2005, the Trial Chamber issued its "Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" on 17 November 2005 ("Impugned Decision"). In that decision, the Trial Chamber granted Ojdanić's Application in part and ordered Canada, Iceland, Luxembourg, the United States and the North Atlantic Treaty Organization ("NATO") to produce documents of intercepted communications made during a specific period and taking place in whole or in part in the Federal Republic of Yugoslavia.

3. Thereafter, the United States filed its Request for review of the Impugned Decision on 2 December 2005 as did NATO in a separate filing. . . .

* * * *

III. DISCUSSION

* * * *

The Requirements of Specificity, Relevance and Necessity under Rule 54*bis*

11. The first issue to be decided by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić's Application met the requirements of specificity, relevance and necessity in making his request for information and documents under Rule 54*bis*. Under those requirements, a party must: (1) identify as far as possible the

documents or information to which the application relates; and (2) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter.

12. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber ordered the United States to produce the documents and information requested in paragraphs (A) and (B) of Ojdanić's Application as follows:

> (A) Copies of all recordings, summaries, notes or text of any intercepted communications (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanić was a party and which:
>
> (1) General Ojdanić participated in the communication from Belgrade, Federal Republic of Yugoslavia;
>
> (2) the communication was with one of the persons listed in Attachment "A";
>
> (3) may be relevant to one of the following issues in the case:
>
> a) General Ojdanić's knowledge or participation in the intended or actual deportation of Albanians from Kosovo or lack thereof;
>
> b) General Ojdanić's knowledge or participation in the intended or actual killing of civilians in Kosovo or lack thereof;
>
> c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government; and
>
> d) General Ojdanić's efforts to prevent and punish war crimes in Kosovo or lack thereof.
>
> (B) Copies of all recordings, summaries, notes or text of any intercepted communications (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanić was mentioned or referred to by name in the conversation and which:
>
> [same as above].

* * * *

21. The Appeals Chamber considers that the Trial Chamber did not err with regard to applying the relevancy and necessity requirements under Rule 54*bis*. First, the Appeals Chamber recalls that "the State from whom the documents are requested does not have *locus standi* to challenge their relevance" to a trial. Under this rule, a State may not challenge whether, on the basis of the request, the Trial Chamber was able "to accurately determine the relevance of the documents sought." Such a determination is an integral part of the Trial Chamber's competence to determine relevancy. The Appeals Chamber holds that the same rule applies with regard to challenging the necessity of documents or information for a fair determination of the trial.

* * * *

24. The Appeals Chamber also rejects the United States' argument that the necessity requirement under Rule 54*bis* obliges an applicant to demonstrate that it has exhausted all other possible sources for the requested materials. The United States contends that "[m]ost, if not all, of the information the Applicant is seeking, if it exists at all, can be provided by the Applicant himself, his Government and its archives, subordinates who received and executed his commands, or other former or current Serbian officials. In addition, having identified a list of interlocutors in his request, the Applicant has the responsibility to seek corroboration from those sources or to explain why he cannot." Thus, the United States submits that Ojdanić should have made a showing that he has sought and failed to obtain the requested information from all of these other, more direct sources, when making his Rule 54*bis* request.

25. . . . [T]he Appeals Chamber holds that it is reasonable under the necessity requirement for an applicant to demonstrate either that: 1) it has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or 2) the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54*bis* order.

26. In this case, the Appeals Chamber finds that Ojdanić has made the requisite showing. . . .

* * * *

C. The Reasonable Steps Requirement under Rule 54*bis* and its Relationship to Rule 70

28. The next issue to be considered by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić demonstrated that he met the "reasonable steps" requirement under Rule 54*bis* (A)(iii) and (B)(ii) for making a request. Pursuant to that requirement, a party must explain the reasonable steps that it has taken to secure the State's assistance prior to making a Rule 54*bis* request.

29. The United States submits that although the Trial Chamber properly recognized this requirement in the Impugned Decision, it erred in applying it. In particular, the United States claims that the Trial Chamber erred in finding that Ojdanić satisfied his burden to take bona fide, reasonable steps when he rejected information offered by the United States under the conditions of Rule 70.

* * * *

31. The Appeals Chamber considers that the Trial Chamber erred in making this statement and holds, for the reasons that follow, that an applicant may not be found to have met the reasonable steps requirement under Rule 54*bis* where he or she refused the same requested documents or information when they were volunteered by a State under Rule 70.

32. The Appeals Chamber recalls that the basis for a Trial Chamber's power to issue a binding Rule 54*bis* order against a State to produce is found in Article 29(2) of the Statute and paragraph four of Security Council resolution 827 (1993), which provides that "States shall comply without undue delay with [. . .] an order issued by a Trial Chamber" for various kinds of judicial assistance. The binding force for such an order derives from the provisions of Chapter VII and Article 25 of the United Nations Charter. However, Article 29 encompasses "two modes of interaction [by a State] with the International Tribunal" in fulfilling its obligations: cooperative and mandatory compliance. The Appeals Chamber has held that it is sound policy for the Prosecutor as well as defence counsel to first seek the assistance of States through cooperative means. This is due to the fact that "the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States" due to its lack of a police power. Only after a State declines to lend the

requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29.

* * * *

35. The Appeals Chamber considers that the protections for confidential materials produced by order under Rule 54*bis* as compared to those for the same materials provided voluntarily by States under Rule 70 differ in at least two important ways that are significant for this decision. Under Rule 54*bis,* the application of protective measures to the documents or information produced by a State are at the discretion of a Judge or the Trial Chamber who may impose them only after determining that national security interests warrant them. Furthermore, it is at the discretion of the party requesting the information as to the purposes for which it will subsequently be used in proceedings before a Judge or Trial Chamber. Whereas, under Rule 70, a State controls the confidentiality of the information it provides and makes its own determination that this material should be subject to certain protections—for national security interest reasons or otherwise. In addition, the State has control over how it may be used, whether for evidence generation purposes only or also as evidence at trial. Thus, Rule 70 allows for a State to avail itself of control and protections that it is able to maintain over that material in exchange for assisting parties before the International Tribunal in providing confidential material either of its own volition or at their request.

36. These distinctions are particularly important for situations, as in this case, where a State considers that the national security concerns implicated by the disclosure of certain confidential materials are so vital that the decision on disclosure or protective measures for that information cannot be appropriately determined by third parties. The United States contends that Ojdanić's request for confidential information seeks to obtain the product of specific intelligence sources and methods, which "implicates national security information of the highest sensitivity." It argues that answering Ojdanić's request in either the affirmative or the negative would reveal information about the scope and effectiveness of the United States' intelligence capabilities and how they are applied.

Answering in the affirmative "would confirm that the United States' intelligence sources and methods enabled it to intercept specific conversation involving specific individuals in specific locations and in a particular time period" while answering in the negative "would confirm that the United States lacked this capacity or that countermeasures taken to prevent such information from being obtained had been effective." Thus, the United States argues that "the ability to protect intelligence sources and methods is essential to their effectiveness." It submits that although the protective measures outlined in Rule 54*bis* (F), (G) and (I) provide for important protective measures, "they are more limited in scope than and cannot supplant the more comprehensive protections and control available to a cooperating State under Rule 70," which is "expressly constructed to safeguard the sources and methods underlying information."

37. Turning to the reasonable steps requirement under Rule 54*bis*, the Appeals Chamber considers that Ojdanić took the first reasonable step required of parties seeking confidential materials from a State—that is, he made a request to the United States for assistance. However, thereafter, Ojdanić engaged in a series of negotiations with the United States over two to three years, which were, at times, uncooperative. The lengthy negotiations were due in part to disputes over the broad framing of Ojdanić's original request, which the Trial Chamber eventually found failed to meet the specificity and relevancy requirements. Throughout the negotiations, the United States made offers of assistance in providing certain information under Rule 70 in light of its expressed national security concerns with Ojdanić's applications vis-à-vis its intelligence gathering capabilities. However, Ojdanić refused these offers and eventually terminated the process by seeking a compulsory Rule 54*bis* order on grounds that Rule 70 empowers the United States to retain control over the disclosure of the requested material and to prevent it from being used as evidence at trial. While this is the case, the Appeals Chamber notes that Rule 70 does not presuppose that a State will, in fact, decide to retain all of that control at all times or prevent disclosure of all of the requested information at trial. More importantly, the Appeals Chamber considers that a State's availment of Rule 70 protections in assisting a

party with requested information does not equal a State declining to "lend the requested support" such that seeking mandatory action from a Judge or Trial Chamber under Rule 54*bis* is warranted as the next step. A party may not bypass a State's cooperative efforts to assist it with gaining access to certain confidential information simply because that party does not want the State to be able to utilize the protections afforded to it through Rule 70. Thus, the Trial Chamber erred in finding that Ojdanić met the reasonable steps requirement in his Application.

38. That being said, the Appeals Chamber emphasizes that Rule 70 should not be used by States as "a blanket right to withhold, for security purposes, documents necessary for trial" from being disclosed by a party for use as evidence at trial as this would "jeopardise the very function of the International Tribunal, and defeat its essential object and purpose." Indeed, "those documents might prove crucial for deciding whether the accused is innocent or guilty." Furthermore, such an interpretation of Rule 70 would be contrary to States' obligation to cooperate with the International Tribunal under Article 29 of the Statute.

D. The Permissible Scope of a Rule 54*bis* Order to Produce and the Originator Principle

39. The final issue to be determined by the Appeals Chamber is whether the Trial Chamber erred in the Impugned Decision when "including in the scope of its Rule 54*bis* order information that a requested State or international organization does not own or did not originate but received from another State pursuant to express arrangements." The United States claims that this was an abuse of discretion because generally, even after a State shares information with other States, the originating State "must control release of their own information" (the "originator principle"). This is due to the fact that [w]hen a State decides to share intelligence or other sensitive information, it typically does so under an express and binding arrangement, with specific conditions on storage, access and use. That is, the originating State does not transmit absolute rights over the information, but retains residual rights and control. It remains the owner of the information.

* * * *

40. Further, . . . the United States argues that the Impugned Decision's Rule 54*bis* order to States and NATO to provide information that did not originate with them was unnecessary and, if allowed to stand, "will undermine existing information-sharing regimes and have a chilling effect on the sharing of sensitive information."

* * * *

42. The Appeals Chamber . . . accepts the United States' argument that this holding could directly affect it in two ways and therefore, the United States has standing to challenge it. First, it would require NATO, as a third-party holder of information originating from the United States, to provide that information to the International Tribunal. Second, because the Trial Chamber generally stipulated that its holding "applies equally to material received by one State from another" it "would require the United States to produce any responsive information in its possession that had originated with another State" in the future if served with a Rule 54*bis* order.

43. The Appeals Chamber finds that the Trial Chamber erred in paragraph 38 of the Impugned Decision when summarily dismissing the issues of ownership and origination of information as irrelevant to a Rule 54*bis* order. Nothing in the text of Rule 54*bis* or the jurisprudence concerning the International Tribunal's power to issue compelling orders to States precludes consideration of these matters or indicates that the only question of concern for a Trial Chamber is whether or not the State is in possession of the requested information or documents. Furthermore, the Appeals Chamber recalls that the Rules of the International Tribunal have been intentionally drafted to take into account certain State interests and to provide safeguards for them in order to encourage States in the fulfilment of their obligation to cooperate with the International Tribunal under Article 29 of the Statute. Indeed, under Rule 54*bis,* a Judge or a Trial Chamber is required to consider the national security interests raised by a State in determining whether to issue a Rule 54*bis* order or whether to direct, on national security interests grounds, protective measures for the documents or information to be produced by a State under a Rule 54*bis* order.

44. In this case, the Appeals Chamber has no reason to doubt the United States' assertion that it has a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other States and entities. The Appeals Chamber accepts as logical the United States' claim that, were it to divulge this information without the consent of the information providers, this could lead other States to doubt the United States' willingness and ability to keep secrets entrusted to it and therefore make other States less willing to share sensitive information with the United States in the future. Application of protective measures to this information handed-over by the United States would clearly not suffice to protect this national security interest. The Appeals Chamber notes, moreover, that the Trial Chamber issued Rule 54*bis* orders to other States that might have provided the United States with information responsive to Ojdanić's requests. Rule 54*bis* orders to these States provide Ojdanić with an alternate means of obtaining responsive information that may have been provided to the United States.

45. The Appeals Chamber holds that in these circumstances, a properly tailored Rule 54*bis* order would necessarily avoid requiring production of information over which the United States does not have ownership. Indeed, the bona fide national security interest asserted here by the United States is one that, far from being irrelevant to whether a Rule 54bis order will issue – as paragraph 38 of the Impugned Decision implies – deserves the utmost consideration.

IV. DISPOSITION

46. On the basis of the foregoing, the Appeals Chamber GRANTS the Request of the United States in part as it relates to the Trial Chamber's errors in the Impugned Decision in finding that Ojdanić met the reasonable steps requirement under Rule 54bis and holding that a Rule 54bis order requires production of documents or information regardless of ownership or origination, SETS ASIDE paragraph (1) of the Impugned Decision's Disposition insofar as it orders the United States, pursuant to Rule 54*bis*, to produce to Ojdanić the documents and information requested in paragraphs (A) and (B) of his Application, and INVITES Odjanić and the United States to immediately resume their negotiations

for provision of the information requested in paragraphs (A) and (B) of Ojdanić's Application consistent with this Decision and to conclude them as expediently as possible in light of the pending commencement of the trial in this case.

c. Iraqi High Tribunal

In a letter to the editor of the International Herald Tribune on March 5, 2006, Department of State Legal Adviser John B. Bellinger, III, addressed the importance of the Iraqi High Tribunal and of international support for it. Mr. Bellinger's letter is set forth below in full. *See also* Mr. Bellinger's address at Chatham House, London, on February 9, 2006, "Supporting Justice and Accountability in Iraq," available at *www.state.gov/s/l/c8183.htm*.

Saddam Hussein and other former senior-level regime officials have dealt with the Iraqi High Tribunal—the court established by the Iraqis to prosecute them for war crimes, crimes against humanity, genocide, and certain crimes under Iraqi law—with contempt. Their frequent outbursts during court proceedings, periodic boycotts, and perfunctory hunger strikes, are calculated manipulations designed to derail the Tribunal, which has also faced other well-publicized challenges—including the murders of defense counsel and the resignations of judges. Critics point to these challenges as evidence that the Tribunal cannot deliver justice and that Saddam should have been tried in an international tribunal outside Iraq. They are wrong. And, worse, the international community criticizes the trial from afar but has not found ways to support the Iraqis as they pursue justice and accountability.

Focusing on Saddam's outbursts and the trial's other challenges misses the bigger picture. The mere fact that trials are taking place, witnesses are coming forward, and culpability will be adjudicated on the evidence is a remarkable achievement, particularly given the brutality with which people who spoke out against the regime under Saddam Hussein would have been tortured and repressed. Courageous Iraqi judges, prosecutors, defense attorneys, victims,

and witnesses are working each day toward justice and accountability in Iraq in difficult and dangerous circumstances. The Tribunal's work is being televised across Iraq, underscoring to the Iraqi people that justice is being served and the rule of law is being restored in their country.

From the beginning, the Iraqis have sought international support for a domestic Iraqi trial mechanism. The Iraqi-drafted statute for the Tribunal explicitly authorized international advisers and the Iraqi Deputy Prime Minister wrote to foreign governments to solicit their support. The United States has responded by providing significant support to the Tribunal. We established a Regime Crimes Liaison's Office (RCLO), and allocated $128 million to support the Iraqi-led process. The RCLO provides, among other things, training for judges, prosecutors and security personnel, coordination in mass grave exhumation and assistance for the construction of a courthouse.

With only a few valued exceptions from our coalition partners and a handful of NGOs, the Iraqi requests for assistance have fallen on deaf ears. The international community is effectively boycotting the Tribunal in spite of its insistent calls for justice and accountability before the 2003 liberation of Iraq. The UN has even specifically prohibited its personnel from lending a hand to the Tribunal.

Several reasons have been given for this reluctance to help, including the fact that the new Iraqi government has retained the death penalty, a preference for an international tribunal over the Iraqi Tribunal, and concerns that the legal structures and protections of the Tribunal do not meet international standards. But these objections reflect a paternalistic attitude towards justice in post-conflict societies and a lack of respect for Iraqi sovereignty. They ignore that international tribunals like those for the former Yugoslavia and Rwanda have not themselves been models of efficiency and decorum and have faced many of the same challenges as the Iraqi Tribunal. And they fail to recognize that international support is the best way to ensure that the Tribunal meets international standards. If the international community is truly committed to justice and accountability in Iraq, it should advise and assist the Iraqi-led process, not abstain.

03-Cummins-Chap03.indd 270 10/22/07 11:34:09 PM

Those committed to documenting human rights abuses could help in locating, exhuming, and identifying victims from at least 180 confirmed mass graves sites in Iraq. NGOs and other countries should also share evidence of abuses in their possession. Those concerned with ensuring that the Tribunal conforms to international standards of criminal justice could provide international advisors for the Tribunal's Defense Office, Appellate Chamber, and Prosecutor's Office, or fund advisors through an International Bar Association-managed fund established for this purpose. The Tribunal also needs general administrative support and financial and logistical support for its witness and judicial protection programs.

The international community has much to gain from the Tribunal's success—keeping faith with our words, helping Iraqis heal their wounds, restoring the rule of law so as to prevent any relapses, and signaling to other despots that their crimes will not be forgotten. The Iraqis are fully committed to this process. The tasks before them are enormous, and the risks are grave. But through their determination and their courage, they have earned our support.

On November 5, 2006, Saddam Hussein was convicted and sentenced to death by the Iraqi High Tribunal for the massacres committed by his regime in the town of Dujayl. President Bush commented as follows on the verdict:

> . . . Saddam Hussein's trial is a milestone in the Iraqi people's efforts to replace the rule of a tyrant with the rule of law—it's a major achievement for Iraq's young democracy and its constitutional government.
>
> During Saddam Hussein's trial, the court received evidence from 130 witnesses. The man who once struck fear in the hearts of Iraqis had to listen to free Iraqis recount the acts of torture and murder that he ordered against their families and against them. Today, the victims of this regime have received a measure of the justice which many thought would never come.
>
> Saddam Hussein will have an automatic right to appeal his sentence; he will continue to receive the due process and the legal rights that he denied the Iraqi people.

> . . . [H]istory will record today's judgment as an important achievement on the path to a free and just and unified society.

The full text of President Bush's statement is available at 42 WEEKLY COMP. PRES. DOC. 1992 (Nov. 13, 2006). Saddam Hussein was executed by hanging on December 30, 2006. President Bush stated: "Today, Saddam Hussein was executed after receiving a fair trial—the kind of justice he denied the victims of his brutal regime." *See www.whitehouse.gov/news/releases/2006/11/20061105-1.html*

d. Lebanon: Tribunal of an international character

As noted in C.1. *supra*, the United States actively supported adoption of UN Security Council Resolution 1664 on March 29, 2006, in which the Council stated in part that it:

> 1. *Welcomes* the report of the Secretary-General, and requests him to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice, taking into account the recommendations of his report and the views that have been expressed by Council members;
>
> * * * *

See also UN Security Council Resolution 1686, adopted June 15, 2006, extending the mandate of the International Independent Investigation Commission "to assist Lebanon in the search for the truth and in holding all those involved in [the attack on Prime Minister Hariri] accountable" and supporting the Commission's intention "to extend further its technical assistance to the Lebanese authorities with regard to their investigations into the other terrorist attacks perpetrated in Lebanon since 1 October 2004. . . ."

On November 15, 2006, Secretary-General Kofi Annan submitted a report to the Security Council on the establishment

of a special tribunal for Lebanon pursuant to Resolution 1664. U.N. Doc. S/2006/893, available at *http://documents.un.org*. The report provided an analysis of the legal nature and specificities of the special tribunal; its temporal, personal, and subject matter jurisdiction; organizational structure; conduct of the trial process; and the agreement between the United Nations and the Government of Lebanon. Paragraph 6 of the report stated:

> The legal basis for the establishment of the special tribunal is an agreement between the United Nations and the Government of Lebanon, to which the statute of the tribunal is attached (see annex I). As a treaty-based organ, the special tribunal is neither a subsidiary organ of the United Nations, nor is it a part of the Lebanese court system.

As to the temporal jurisdiction of the tribunal, the report explained in paragraph 11:

> Extending the jurisdiction of the tribunal beyond the assassination of Rafiq Hariri to other attacks [committed between 1 October 2004 and 12 December 2005] is not, strictly speaking, an extension of the temporal jurisdiction of the tribunal, but rather an extension of its jurisdiction to include, within a specified period, other attacks that the tribunal might find to be connected to the Hariri assassination and similar to it in nature and gravity. The list of such attacks is included in . . . [U.N. Doc.] S/2006/161, para.55. . . .

Such jurisdiction would also promote a perception of "fairness, impartiality and objectivity of the special tribunal." *See* paragraphs 17 and 18.

While the report indicated that consideration was given to including crimes against humanity within the subject matter jurisdiction of the tribunal, paragraph 25 indicates that "there was insufficient support" for its inclusion and "therefore, the qualification of the crimes was limited to common crimes under the Lebanese Criminal Code."

In paragraph 54, the Secretary-General concluded by reporting developments with the government of Lebanon:

> On 10 November 2006, I transmitted to the Prime Minister of Lebanon the draft agreement between the United Nations and the Government of Lebanon on the establishment of a special tribunal for Lebanon, to which was annexed a draft statute for such a tribunal. By his letter to me of 13 November 2006, the Prime Minister informed me that the Lebanese Council of Ministers had agreed in its session of that date to the draft and looked forward to the completion of the remaining steps leading to the establishment of the tribunal. By a note verbale dated 14 November 2006, the Permanent Mission of Lebanon forwarded to me a copy of observations made by the President of the Lebanese Republic, including a challenge to the decision of the Council of Ministers. The negotiated instruments are now submitted to the Security Council for its consideration.

In a letter of November 21, 2006, the President of the Security Council informed the Secretary-General that the members of the Security Council were "satisfied with the Agreement annexed to the report, including the Statute of the Special Tribunal," and invited him "to proceed, together with the Government of Lebanon, in conformity with the Constitution of Lebanon, with the final steps for the conclusion of the Agreement." U.N. Doc. S/2006/911, available at *http://documents.un.org*.

Also on November 21, 2006, President Bush issued a statement on the assassination that day of Lebanese Industry Minister Pierre Gemayel, which "shows yet again the viciousness of those who are trying to destabilize that country." Among other things, the President "urge[d] the U.N. Security Council and the Secretary-General today to take the remaining steps needed to establish the special tribunal for Lebanon that will try those accused of involvement in the assassination of former Prime Minister Hariri, and to ensure that that tribunal

can also bring to justice those responsible for related assassinations, assassination attempts, and other terrorist attacks." 42 WEEKLY COMP. PRES. DOC. 2086 (Nov. 27, 2006).

e. Special Court for Sierra Leone

On March 29, 2006, former President Charles Taylor was transferred from Nigeria to the Special Court for Sierra Leone. A press release from the court on March 30, 2006, announced that

> The President of the Special Court for Sierra Leone, Justice A. Raja N. Fernando, yesterday made a request to the Government of The Netherlands and the President of the International Criminal Court (ICC) to facilitate the conduct of the trial of former Liberian President Charles Taylor by the Special Court in The Hague. . . .
>
> The trial would . . . be held by a Trial Chamber of the Special Court for Sierra Leone, sitting in the Hague.
>
> Justice Fernando's letter referred to concerns about the stability in the region should Taylor be tried in Freetown.
>
> * * * *

The press release is available at *www.sc-sl.org/Press/pressrelease-033006.pdf*.

On June 16, 2006, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1688. Among other things, the Security Council took note of "the intention of the President of the Special Court to authorize a Trial Chamber to exercise its functions away from the seat of the Special Court"; welcomed "the willingness of the Government of the Netherlands, as expressed in the exchange of letters dated 29 March 2006, to host the Special Court for the detention and trial of former President Taylor, including any appeal"; and took note of "the willingness of the International Criminal Court, as requested by the Special Court and as expressed in the Memorandum dated 13 April 2006 to allow the use of its premises for the detention and trial of former President Taylor by the Special Court,

including any appeal." The Council requested the Secretary-General to assist in the "conclusion of all necessary legal and practical arrangements, including for the transfer of former President Taylor to the Special Court in the Netherlands and for the provision of the necessary facilities for the conduct of the trial, in consultation with the Special Court, as well as the Government of the Netherlands." U.N. Doc. S/RES/1688 (2006). The judicial proceedings will be exclusively those of the Special Court.

On June 20, 2006, Taylor was transferred to The Hague. A press release from the Department of State welcomed the move as excerpted below. The full text of the press release is available at *www.state.gov/r/pa/prs/ps/2006/68192.htm*.

The United States welcomes the June 20 transfer of former Liberian President Charles Taylor from Sierra Leone to The Hague where he will stand trial for war crimes and crimes against humanity. This action is an important step forward for justice and accountability and will contribute to stability in West Africa after decades of civil conflict.

Charles Taylor's arrest and trial is the result of years of support for democracy and diplomatic efforts by the U.S. and our international partners. Beginning in 2001 when President Bush took office, we have been working toward a democratic transition in Liberia. In 2003, President Bush demanded that Charles Taylor step down to help bring peace to Liberia. Nigeria offered Taylor a temporary place of exile in order to facilitate his departure. However, the United States always maintained that Charles Taylor needed to be held accountable for his actions. We therefore supported Nigeria's decision in March to turn Taylor over to the democratically elected Government of Liberia.

Before this transfer took place, the United States worked in the UN Security Council to make Taylor's trial possible. We authored Resolution 1638 last November giving the UN Mission in Liberia (UNMIL) the authority to arrest Charles Taylor and take him to the Sierra Leone Special Court. We subsequently worked to ensure

the adoption of Resolution 1688 on June 16, which authorized the Special Court to be able to hold Taylor's trial in The Hague.

Charles Taylor is the first African president to face charges of war crimes and crimes against humanity. His trial will demonstrate the international community's commitment to holding individuals responsible for their actions. We applaud the efforts all those who have worked with us to bring Charles Taylor to justice.

2. International Criminal Court

Department of State Legal Adviser John B. Bellinger, III, summarized the U.S. views on the International Criminal Court in remarks excerpted in C.1. *supra*. In an address, "Reflections on Transatlantic Approaches to International Law," at the Duke Law School Center for International and Comparative Law, on November 15, 2006, Mr. Bellinger stated further, in part:

> . . . We share with the parties to the Rome Statute a commitment to ensuring accountability for genocide, war crimes, and crimes against humanity. Our record is strong and clear: from Nuremberg to our unwavering support for the U.N. tribunals established to prosecute crimes committed in the former Yugoslavia, Rwanda, and Sierra Leone.
>
> . . . What we disagree with is the ICC's method for achieving accountability. Our concerns are not frivolous, although to those who are products of different traditions these concerns may not be immediately convincing. It is a deeply held American belief that power needs to be checked and public actors need to be held accountable. From the U.S. perspective, the ICC lacks necessary checks and balances, in part because the Rome Statute gives the ICC prosecutor the ability to initiate cases without appropriate oversight by the UN Security Council, creating an undue risk of politicized prosecutions. We also object on principle to the ICC's claim of jurisdiction over persons from non-party states.

a. Provision of military assistance

(1) Waivers

The American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7421 *et seq.* prohibits the provision of military assistance to the government of a country that is a party to the Rome Statue, with certain exceptions. On August 2, President Bush waived the prohibition on assistance to Lesotho, determining that Lesotho had "entered into an agreement with the United States pursuant to Article 98 of the Rome State preventing the International Criminal Court from proceeding against U.S. personnel present" in that country. 71 Fed. Reg. 45,361 (Aug. 9, 2006). On November 22, 2006, the President waived the prohibition on assistance to Comoros and Saint Kitts and Nevis on the same basis. Presidential Determination No. 2007-4, 71 Fed. Reg. 74,451 (Dec. 12, 2006).

On March 9, 2006, Secretary of State Condoleezza Rice stated in testimony before the House Appropriations Subcommittee that the Department of State "has been successful in getting a number of Article 98 agreements and we think that it's been helpful to do that." Secretary Rice continued, however, "[w]e have run into circumstances where the inability of a state, for a variety of reasons, to enter into an Article 98 agreement has put us in the odd position of being unable to provide certain assistance to a state that, for instance, wants to help us in Afghanistan or Iraq."

As a result, on September 29, 2006, President Bush determined and reported to Congress that it was "important to the national interest of the United States to waive the prohibition on U.S. military assistance provided under the International Military Education and Training program, chapter 5 of part II of the Foreign Assistance Act of 1961," for Barbados, Bolivia, Brazil, Costa Rica, Croatia, Ecuador, Kenya, Mali, Malta, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, Serbia, South Africa, St. Vincent and the Grenadines, Tanzania, Trinidad and Tobago, and Uruguay. Presidential Determination No. 2006-27 71 Fed. Reg. 65,367 (Nov. 8, 2006).

(2) Statutory amendment

Section 1222 of the National Defense Authorization Act, Pub. L. No. 109-364, amended § 2013(13)(A) of the American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7432(13)(A), to remove military assistance provided under the International Military Education and Training program from the definition of "United States military assistance" prohibited by the act.

b. Economic Support Fund

Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 2006, Pub. L. 109-102, 119 Stat. 2172, prohibits foreign assistance from the Economic Support Fund to a country that is "a party to the International Criminal Court and has not entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Court from proceeding against United States personnel present in such country," absent a Presidential waiver. On November 27, 2006, President Bush determined that it was important to the national interests of the United States to waive the prohibition of section 574 with respect to Bolivia, Costa Rica, Cyprus, Ecuador, Kenya, Mali, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, South Africa, and Tanzania. Presidential Determination No. 2007-5, 71 Fed. Reg. 74,453 (Dec. 12, 2006).

Cross References

Removal for conviction for aggravated felony, **Chapter 1.C.1.d.**
Reservations to Terrorist Bombings Convention, **Chapter 4.B.3.a.**
Definitions of "terrorism" and related terms from U.S. federal statutes and related, **Chapter 6.A.4.b.**
Renditions, **Chapter 6.A.4.b., F.2.b., and H.1.b.**
Human rights and counter-terrorism, **Chapter 6.K.**

Cases related to terrorism exception to FSIA, **Chapter 10.A.1.b.(3) and d.(1) and (2).**
U.S.-Ecuador agreement on shipboarding for counternarcotics and migrant smuggling, **Chapter 12.A.7.**
Wildlife trafficking, **Chapter 13.A.5.**
UN sanctions, **Chapter 16.B.1 and 2.**

Chapter 4

Treaty Affairs

A. CAPACITY TO MAKE

Unilateral Acts of States

On October 30, 2006, Elizabeth Wilcox, Deputy Legal Adviser, U.S. Mission to the United Nations, addressed the 61st session of the UN General Assembly Sixth Committee on the Report of the International Law Commission on its 58th Session. Ms. Wilcox commented on the issue of unilateral acts of states, including the importance of a restrictive approach in finding obligations and of the ability to revoke unilateral declarations. The full text of the U.S. statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The United States has long recognized the particular challenges raised by this topic [of unilateral acts of states]. . . . These challenges notwithstanding, the Commission has adopted a set of guiding principles that, in our view, present a fitting conclusion to the Commission's deliberations on this topic.

We would like to say a few words about the principles adopted by the Commission. We welcome the Commission's decision to focus its conclusions on "formal declarations formulated by a State with the intent to produce obligations under international law." States should be able to make public statements without the fear

04-Cummins-Chap04.indd 281 10/22/07 11:37:37 PM

that they inadvertently may be creating obligations that are binding under international law. States should only be bound by unilateral public declarations when they intend to be bound. The efficacy of the Commission's principles lies in the extent to which they serve this objective.

We believe that principles that provide that "[a] unilateral declaration entails obligations for the formulating States only if it is stated in clear and specific terms" and that "[i]n the case of doubt as to the scope of obligations resulting from such declarations . . . [obligations] must be interpreted in a restrictive manner" are essential considerations in any determinations as to the legal effect of a unilateral declaration. The need for restrictive interpretations is consistent with the principle that States should be able to make public declarations without fear that they may be determined to have inadvertently created binding obligations under international law.

The Commission's conclusions regarding the interplay between unilateral declarations and peremptory norms of international law should brook no controversy. The notion that unilateral declarations by a State could trump peremptory norms of international law is unacceptable.

One principle that concerns us, however, is the one concerning revocation of unilateral declarations. We understand the desire to limit arbitrary revocations of unilateral declarations in cases where a State has clearly manifested its intent to be bound and there has been detrimental reliance on that declaration by the addressee. It is not obvious, however, that there should be, for example, conditions on the revocability of such declarations in accordance with the application of the fundamental change in circumstances principle that is enshrined in Article 62 of the Vienna Convention on the Law of Treaties. In our view, a fundamental change in circumstances may be sufficient to justify the revocation of a declaration even if there is a clear manifestation of intent to be bound and notwithstanding other considerations set out in Article 62. Unilateral declarations after all are distinguishable from agreements negotiated between or among two or more States, and it thus does not necessarily follow that rules related to the revocation of such treaties should apply automatically to unilateral declarations.

* * * *

B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Conclusion

On November 15, 2006, John B. Bellinger, III, Legal Adviser for the Department of State, addressed the Duke Law School Center for International and Comparative Law on "Reflections on Transatlantic Approaches to International Law." Among other things, Mr. Bellinger addressed the U.S. view toward entering into treaties, as excerpted below. The full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

. . . Because we take our international obligations seriously, we do not enter into them lightly. In negotiations, my lawyers and I push for clarity of language – Congress and the public need to know what we are signing up to. Unfortunately, our efforts to fend off fudged language are sometimes criticized as obstructionist, or as attempts to block consensus.

In addition, we will not join a treaty until we know we can implement it. In some cases, it proves difficult or impossible to get implementing legislation – even when we are already substantially compliant with the obligations the treaty would impose. Contrast this with the many countries that join first and tackle implementation later – an approach particularly common in the fields of international environmental and human rights law. The result is that the United States can look like a laggard or malingerer, reluctant to make an international commitment. Ironically, in such cases we take a bigger reputational hit than those countries that join but then utterly fail to comply. Compliance issues do not lend themselves so readily to the sound-bite.

A related issue is our greater reluctance to sign up to a treaty simply to join consensus or set international standards, especially when we need to ignore well-founded concerns in order to do so. This can cost us, particularly when the treaty is – or seems to be – on

a feel-good topic. For example, we have recently taken a drubbing over the UNESCO Cultural Diversity Convention, accused of being against culture, against diversity, and against treaties. This is nonsensical. The United States is one of the most multicultural nations on the planet. The Convention, however, reflects the efforts of some countries to engage in protectionist behavior under the guise of diversity. Its ambiguous language can be read to permit the imposition of restrictive trade measures on goods and services defined as "cultural," including books, newspapers, magazines, and even internet websites. This could subvert other international mechanisms, such as the WTO, and could, by hindering the free flow of information, raise human rights concerns. It is also inconsistent with the values embodied in our First Amendment.

Failure to join a treaty regime, however, should not be equated with a lack of respect for international law. Nor should it be viewed as a lack of concern for the underlying substantive issue. There are more ways than one to demonstrate commitment. For example, in the case of the recently concluded U.N. Disabilities Treaty, we participated actively in the drafting and provided expert advice, although we do not intend to become a party. Our basic position – stemming in part from our experience with the Americans with Disabilities Act – is that the best way to improve the life of the world's disabled is for countries to concentrate on their domestic legal frameworks.

* * * *

2. Interpretation

a. In context of ICCPR

As discussed in Chapter 6.A.4., the United States met with members of the UN Committee on Human Rights from July 17-18, 2006, to discuss U.S. implementation of the International Covenant on Civil and Political Rights ("ICCPR"). During the July 2006 session, Department of State Assistant Legal Adviser for Human Rights and Refugees Robert K. Harris provided U.S. views on entering into and interpreting treaties,

including its view that the Human Rights Committee cannot issue authoritative interpretations of the ICCPR. Mr. Harris's remarks are set forth below and available at *www.state.gov/s/l/c8183.htm.*

In the past two sessions, the United States delegation and members of the Human Rights Committee have had a lively exchange of views on several matters involving the interpretation of the Covenant. This exchange has highlighted that there are principled differences of view about the scope of several articles of the Covenant. I would start by stating not only that these opinions are deeply and honestly held by all participants, but also that these differences may also reflect a different approach to the way treaty law is made and interpreted and about the way in which countries assume treaty obligations. I thought it might make sense while we have a few minutes before we end today's session to explain the way we in the United States government look at international treaty law.

The United States continues to apply a traditional approach to entering into and interpreting treaties. Under this approach, it is for each government to decide as an exercise of its sovereignty to assume treaty obligations, which, once entered into, it has a solemn and international legal obligation to fulfill. This means that treaty obligations by their nature reflect a clear and express consent of a state to assume such obligations. At the time the United States becomes party to a treaty, it conducts a very careful review of every provision in the treaty to determine whether the United States throughout its territory can implement all of the obligations it would assume under that instrument. If there are obligations that cannot be fulfilled, the United States may decide to implement necessary laws or regulations. Where it decides that it cannot or is not prepared to assume a particular obligation and where it can lawfully do so under international treaty law, it may choose instead of adopting a new law, to file an appropriate formal reservation to the treaty. The United States adopts a rigorous and transparent process to clearly describe what obligations it will assume both to the United States Senate—which must approve treaties before the

United States can join them under U.S. law—and to our potential treaty partners. The Senate of the United States then, if it so chooses, gives its "advice and consent" both to the treaty and to any reservations, understandings and declarations that will describe the obligations to be assumed by the United States under that instrument. Thus, at the time the United States becomes a party to a treaty, it agrees to become bound subject to a very clear notion of what treaty obligations it has assumed. Accordingly, based on the operation of our Constitutional processes and through the operation of the rule of law, the United States becomes bound to clearly defined treaty obligations and files formal reservations, understandings and declarations. It is important to note that this is how we approach *all* treaties, and human rights treaties are simply an example of that general practice.

The explanation of the process of the United States' becoming party to a treaty is closely related to the way the United States thinks about how its treaty obligations are to be interpreted and how those obligations might be changed. As a general matter, parties to a treaty under international treaty law could through provisions in the treaty agree to allow another entity to interpret or otherwise resolve questions relating to their obligations. In the case of the Covenant, the United States has not given authority to another entity to fashion or otherwise determine its treaty obligations. The obligations that are binding on the United States are those set forth in the Covenant, interpreted pursuant to the canons of treaty interpretation set forth in international law. With great respect for the Human Rights Committee, we note that article 40, which Professor Kalin mentioned, does not give the Committee the authority to alter treaty obligations or to issue authoritative interpretation of the treaty. With respect to the jurisprudence of the Committee, over the years there have been utterances in general comments and in country recommendations with which the United States disagrees, and these are honest differences of opinion. Many of the Committee's more ambitious opinions may reflect an attempt to fill what it may consider to be gaps in the reach and coverage of the instrument. Given the view of the United States that it has assumed treaty obligations based on its consent and given the care it takes to ascertain those obligations at the time it decides to

become party to a treaty, the United States takes the view that if there are gaps in a treaty, the proper approach to take under international treaty law is to *amend* the treaty to fill those gaps. Based on the doctrine of consent, parties as an exercise of their sovereignty can decide for themselves whether they will be bound by what are, in fact, new treaty obligations.

As we continue our dialog with the Committee on matters involving the interpretation of specific provisions of the Covenant, we hope that this broader overview of the way we look at general treaty law might give more context to the way we in the United States conducts such analysis.

b. Role of travaux préparatoires

Following testimony concerning the Corruption Convention before the Senate Foreign Relations Committee on June 21, 2006, Deputy Legal Adviser Samuel Witten responded to questions from Senator Joseph Biden. *See also* Chapter 3.B.5.a. One of the questions asked about "the authoritative nature of the *travaux préparatoires* that was submitted to the Senate for its information in connection with submission of the Convention." Mr. Witten responded:

> The Interpretive Notes for the official records (*travaux préparatoires*) serve to preserve certain points relating to articles of the instruments that are subsidiary to the text but nonetheless of potential interpretive importance. In accordance with customary international law, as reflected in Article 32 of the Vienna Convention on the Law of Treaties, preparatory work such as that memorialized in the Interpretive Notes may serve as a supplementary means of interpretation, if an interpretation of the treaty done in good faith and in accordance with the ordinary meaning given to the terms of the treaty results in ambiguity or is manifestly absurd. Thus, the Interpretive Notes, while not binding as a matter of treaty law, could be important as a guide to the meaning of terms in the Convention and Protocols.

The full text of the questions and answers is available at *www.state.gov/s/lc/8183.htm*.

3. Reservations

a. International Convention for the Suppression of Terrorist Bombings

During 2006 the United States responded to reservations submitted by Egypt and Belgium to the International Convention for the Suppression of Terrorist Bombings. The reservations, with the U.S. interpretative statement in connection with the action taken by Egypt and its objection to the action taken by Belgium, as well as statements made by other countries, are included by the United Nations as depositary in its depositary status list for this Convention, available at *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp*. The individual UN documents can also be found at *http://documents.un.org*.

(1) Military exception

Article 19(2) of the 1997 International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombing Convention") provides that the convention does not apply to: (1) "activities of armed forces during an armed conflict" that are governed by international humanitarian law; or (2) "activities undertaken by military forces of a State in the exercise of their official duties" that are governed by other rules of international law. On August 9, 2005, Egypt submitted a reservation to Article 19(2), stating:

> The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law.

C.N.634.2005.TREATIES-11 (Depositary Notification) August 16, 2005.

The United States was concerned that, with this purported reservation, Egypt sought to unilaterally expand the scope of the Convention to provide that if military forces violate the rules and principles of international law, their activities would fall within the scope of the Convention, contrary to the intent of the parties and in conflict with other bodies of law. As a result, Egypt's reservation might be viewed as potentially subjecting U.S. and other national armed forces to possible prosecution or extradition under the terms of the Convention.

The United States therefore filed an interpretative statement on August 16, 2006, clarifying that Egypt's reservation is a declaration that only affects Egypt's obligations under the Convention, as set forth below. C.N.677.2006.TREATIES-16 (Depositary Notification). Other countries, including the United Kingdom and the Russian Federation, filed similar responses to the Egyptian reservation.

The Government of the United States of America has examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The declaration appears to purport to extend the scope of application of the Convention to include the armed forces of a State, to the extent that those forces fail to meet the test that they 'do not violate the rules and principles of international law'. Such activities would otherwise be excluded from the application of the Convention by virtue of article 19, paragraph 2. It is the opinion of the United States that the Government of Egypt is entitled to make such a declaration only insofar as the declaration constitutes a unilateral declaration by the Government of Egypt that Egypt will apply the terms of the Convention in circumstances going beyond those required by the Convention to its own armed forces on a unilateral basis. The United States considers this to be the effect of the declaration made by Egypt. However, in the view of the United States, Egypt cannot by a unilateral declaration extend

the obligations of the United States or any country other than Egypt under the Convention beyond those obligations set out in the Convention without the express consent of the United States or other countries. To avoid any doubt, the United States wishes to make clear that it does not consent to Egypt's declaration. Moreover, the United States does not consider the declaration made by the Government of Egypt to have any effect in respect of the obligations of the United States under the Convention or in respect of the application of the Convention to the armed forces of the United States. The United States thus regards the Convention as entering into force between the United States and Egypt subject to a unilateral declaration made by the Government of Egypt, which applies only to the obligations of Egypt under the Convention and only in respect of the armed forces of Egypt.

(2) Extradition and mutual legal assistance

On May 20, 2005, Belgium submitted a declaration to Article 11 of the 1997 Terrorist Bombings Convention, along with its instrument of ratification. The declaration was in effect a reservation to Article 11, which provides that a request for extradition or mutual legal assistance may not be refused on the sole ground that it concerns a political offense or an offense connected with a political offense or an offense inspired by political motives. The Belgian declaration read as follows:

> As for article 11 of the Convention, the Government of Belgium makes the following reservation:
>
> 1. In exceptional circumstances, the Government of Belgium reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offense or as an offence connected with a political offence or as an offence inspired by political motives.
>
> a. In cases where the preceding paragraph is applicable, Belgium recalls that it is bound by the general legal

principle *aut dedere aut judicare*,* pursuant to the rules governing the competence of its courts.

C.N.394.2005.TREATIES-5 (Depositary Notification).

The United States submitted a formal objection to the Belgian reservation. The U.S. objection did not preclude the entry into force of the Terrorist Bombing Convention between the United States and Belgium. The legal effect of the objection is that Article 11 would not apply between the United States and Belgium to the extent of the declaration, according to customary principles of international treaty law as reflected in Article 21(3) of the Vienna Convention on the Law of Treaties. The United States believed that the submission of a formal objection was necessary to preserve its position on an important tool in the fight against terrorism and to avoid undermining the U.S. position in the negotiation of other counter-terrorism conventions. The United States declaration read as set forth below.

With regard to the declaration made by Belgium upon ratification:

The Government of the United States of America, after careful review, considers the Declaration made by Belgium to Article 11 of the Convention, to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The Government of the United States understands that the intent of the Government of Belgium may have been narrower than apparent from its Declaration in that the Government of Belgium would expect its Declaration to apply only in exceptional circumstances where it believes that,

---

* Article 8.1 of the Convention provides:

The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 [concerning establishment of jurisdiction] applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

because of the political nature of the offense, an alleged offender may not receive a fair trial. The United States believes the Declaration is unnecessary because of the safeguards already provided for under Articles 12, 14, and 19(2) of the Convention. However, given the broad wording of the Declaration and because the Government of the United States considers Article 11 to be a critical provision in the Convention, the United States is constrained to file this objection. This objection does not preclude entry into force of the Convention between the United States and Belgium.

b. Athens Convention

During its 92nd session, October 16-20, 2006, the Legal Committee of the International Maritime Organization ("IMO"), adopted the text of a proposed reservation and guidelines for the implementation of the Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 ("2002 Athens Protocol"). As recorded in the Report of the Legal Committee on the Work of its Ninety-Second Session, LEG 92/13, the Secretary-General noted that only four States had thus far ratified the 2002 Athens Protocol and explained that "[t]he main concerns behind the delay in ratification related to the ability of the insurance market to provide compulsory cover up to the general limits established under the Protocol, as well as cover for injury and damage arising from acts of terrorism." IMO Doc. LEG 92/13 at 6, available at *www.state.gov/s/l/c8183.htm*. Resolution A.988(24), adopted December 1, 2005, recommended that "States ratify the Athens Protocol as soon as possible with the reservation that they reserve the right to issue and accept insurance certificates with such special exceptions and limitations as the insurance market conditions at the time of issue of the certificate may necessitate, examples being the biochemical clause and terrorism-related clauses. . . ." The texts of the reservation and guidelines are set forth as Annex 5 to LEG 92/13.

At the 92nd session, the United States objected to the proposed procedure because it amended the treaty through a

"collective reservation" rather than through the procedures for amendment in the treaty itself. A prepared written statement reflecting these views is excerpted below

---

* * * *

. . . While the United States appreciates the complex issues associated with the decision as to whether to exempt carriers from any liability for damage or injury resulting from acts of or related to terrorism, such an exemption presents many difficulties. In particular, when carriers are primarily responsible for providing security for their passengers, the United States cannot support an instrument that effectively exempts carriers unconditionally from any liability for a terrorist incident without regard for fault or possible negligence. This is particularly true in cases of internal attacks, inasmuch as carriers have a duty to provide adequate screening to prevent the introduction of weapons onto the vessel.

With regard to the proposed resolution in front of us, we understand the desire to move expeditiously toward a workable solution to the insurance cover and certification issue so that the 2002 Protocol may enter into force. However, we have significant concerns about the procedural mechanism in this resolution. It aims, in effect, to amend the terms of the Protocol substantively, but without following the revision or amendment procedures prescribed in the Protocol and underlying convention. Such an action could set an unfortunate treaty law precedent that could be invoked not only with respect to other instruments developed under the auspices of the IMO, but more broadly as well. Given the far-reaching consequences of any such departure from established treaty-making principles and practices in all areas, the United States cautions against establishing such a precedent, and would have concerns about whether an instrument could be ratified under these conditions. For these reasons, we cannot support the proposed resolution and suggest that substantive amendments be effected in accordance with the procedures prescribed for revision or amendment of the Protocol.

In a second statement, the United States reiterated its view that "[c]arriers have a duty to provide security for

their passengers and should not be exempt from liability when they fail to do so." The United States found it "difficult to discuss changing the Convention's fundamental terms outside of a diplomatic conference, especially when it regards such an important exemption." Both statements are available at *www.state.gov/s/l/c8183.htm*.

c. Issues addressed by the International Law Commission

(1) Reservations to treaties

On October 30, 2006, Elizabeth Wilcox addressed the 61st meeting of the UN General Assembly Sixth Committee, considering the Report of the International Law Commission on its 58th Session. As to reservations to treaties, the U.S. statement urged restraint in several areas of assessing the validity of such reservations, as excerpted below. The full text is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

As a general matter, we would encourage the Commission to proceed cautiously in considering what types of reservations might be invalid because they would be incompatible with the "object and purpose" of a treaty. We would ask the Commission to recognize that many States have been able to join treaties as a result of the ability to make certain appropriate reservations on such matters as conformity with national laws or the nature of their legal systems.

We would also encourage the Commission to give careful consideration to statements on the prerogatives of treaty implementation bodies to make determinations about the validity of reservations to human rights treaties. We note that the work of the Commission should account for the fact that monitoring bodies should not be making determinations on reservations except in the very unusual circumstance where they have been provided that authority expressly in a treaty.

* * * *

(2) Effect of armed conflicts on treaties

On November 3, 2006, Ms. Wilcox addressed the 61st session of the Sixth Committee on the Report of the International Law Commission on its 58th Session, commenting on the effect of armed conflicts on treaties. Ms. Wilcox stated:

> In general, we feel that it is important to strive for an approach that preserves reasonable continuity of treaty obligations during armed conflict, taking into account particular military necessities. However, we must be careful to avoid rigid rules based on categorizations of treaties or based on an alleged "intent" of the parties, when in most instances the parties will not in fact have had any particular intent about what should happen in the case of armed conflict.

For that reason, the U.S. statement suggested that "[i]t might be most productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict." The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

4. U.S. Treaty Affairs Regulations

On September 8, 2006, the Department of State published a final rule amending the Department's regulations at 22 CFR Part 181 (entitled "Publication, Coordination, and Reporting of International Agreements"), effective October 10, 2006. 71 Fed. Reg. 53,007 (Sept. 8, 2006). The changes in the regulations reflect certain amendments to 1 U.S.C. §§ 112a and 112b (the "Case Act"), as well as certain changes to Executive branch procedures affecting treaties. A proposed rule was published on these subjects on May 18, 2006, requesting comments. 71 Fed. Reg. 28,831 (May 18, 2006).

First, the Department amended procedures regarding the negotiation and conclusion of international agreements to require an agency to consult in a timely manner with the

Office of Management and Budget whenever it is proposing an international agreement that could reasonably require the issuance of a significant domestic regulatory action. In addition, 22 CFR Part 181 was amended to reflect adjustments on the reporting of international agreements to Congress. The regulations now reflect that the Assistant Legal Adviser for Treaty Affairs transmits copies of both unclassified and classified agreements to the Congress. Finally, the amended regulations provide notice that certain categories of international agreements of limited public interest will no longer be published in the compilation entitled "United States Treaties and Other International Agreements" or in the "Treaties and Other International Acts Series."

Excerpts below from the Federal Register explain the statutory framework establishing the Secretary of State's role in treaty making and describe the final rule.

---

* * * *

. . . Two statutes set forth the Secretary's unique role and important responsibilities in the area of publishing, coordinating, and reporting international agreements. Pursuant to 1 U.S.C. 112a, the Secretary of State is required to publish annually a compilation of all treaties and international agreements to which the United States is a party that were signed, proclaimed, or "with reference to which any other final formality ha[d] been executed" during the calendar year. The Secretary of State, however, may determine that certain categories of agreements should not be published if certain criteria are met. Any such determination must be published in the Federal Register.

Under the second statute, 1 U.S.C. 112b, the Secretary of State is required to transmit to the Congress the text of any international agreement other than a treaty to which the United States is a party as soon as practicable but no later than 60 days after it enters into force. Those agreements that the President determines should be classified are to be transmitted, not to Congress as a whole, but to the House Committee on International Relations (at that time called "the House Committee on Foreign Affairs") and to the

Senate Foreign Relations Committee under an injunction of secrecy. The statute further recognizes the Secretary of State's special role in the negotiation and conclusion of all U.S. international agreements, providing that "[n]otwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement."

The Department of State has issued regulations to implement these statutory provisions. These regulations are codified in Part 181 of Chapter 22 of the Code of Federal Regulations (CFR). Congress has amended both 1 U.S.C. 112a and 1 U.S.C. 112b several times, most recently in section 7121 of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458 (Dec. 17, 2004). The State Department is amending sections of 22 CFR Part 181 in order to reflect (1) the changes made to 1 U.S.C. 112a and 112b in December 2004; (2) certain changes made to internal Departmental procedures; and (3) four additional categories of international agreements that meet the non-publication criteria of 1 U.S.C. 112a.

In addition, the Department is amending the procedures regarding the negotiation and conclusion of international agreements. These procedures are set forth in 22 CFR 181.4 and in the Circular 175 procedure referenced therein. In particular, if a proposed international agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a "significant regulatory action" (as defined in section 3 of Executive Order 12866), the agency proposing the agreement shall consult in a timely manner with the OMB regarding such commitment. This amendment is aimed at ensuring that OMB is apprised of international commitments that may have a significant regulatory impact on domestic entities or persons prior to the negotiation or conclusion of the international agreement containing the commitment.

A proposed rule on these subjects was published in the Federal Register on May 18, 2006 (71 FR 28831), which contains a more detailed discussion. . . .

* * * *

5. Treaty Affairs Webpage

The Office of Treaty Affairs in the Department of State Office of the Legal Adviser established a new, searchable webpage in 2006 that provides a wide range of information related to U.S. treaties and international agreements, available at *www.state.gov/s/l/treaty*. The webpage contains an electronic version of the Department of State's annual publication, *Treaties in Force*, and the *Treaties and Other International Acts Series* (the official publication of U.S. agreements), as well as an electronic database entitled Treaty Actions, providing information on actions taken by the United States and other countries on treaties by month during a given year.

The webpage also contains links to the applicable legal authorities (such as 22 CFR Part 181, 11 FAM 700, and the Vienna Convention on the Law of Treaties), an explanation of the Circular 175 procedure (11 FAM 720) and a sample Circular 175 memorandum, status lists for multilateral treaties for which the United States is depositary, the countries with which the United States has collective defense arrangements, and guidance on non-binding documents. The webpage also contains a Highlights section that summarizes recent developments as to specific treaties—including, for example, transmittals, Senate advice and consent, and entry into force. The webpage will continue to be improved and updated in an effort to meet the needs of its diverse audiences—other federal agencies, the Congress, the public, academia, and foreign governments. Foreign treaty offices and the U.S. Senate have inserted links to the new Treaty Affairs webpage on their websites.

Cross References

Executive branch role in determining validity of treaty, **Chapter 3.A.2.b.**

Pre-existing international agreement exception to FSIA, **Chapter 10.C.2.**

Applicability of draft convention on wreck removal to non-parties, **Chapter 12.A.2.**
Tacit amendment procedure in Maritime Labor Convention, **Chapter 12.A.3.**
Silence procedure under JCIC Protocol, **Chapter 18.B.3.**

Chapter 5

Foreign Relations

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

1. Status of Coalition Provisional Authority

On August 16, 2006, the U.S. District Court for the Eastern District of Virginia granted judgment as a matter of law dismissing claims under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, on the ground that relators "did not prove that the claims were presented to the United States" as required under the FCA. *United States ex rel DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006). In this case, "relators allege that defendants defrauded the United States by submitting false invoices and records to justify a $3 million advance payment that defendant, Custer Battles, received pursuant to a contract with the Coalition Provisional Authority ("CPA") for work performed in Iraq in 2003 and 2004." *See Digest 2005* at 225-34, discussing the prior opinion of the same court and providing excerpts from a U.S. brief, filed in response to an order from the district court directing the United States to address the question "whether the CPA is an entity, agency, or instrumentality of the United States for the False Claims Act." In its brief, the United States took the position that the status of the CPA, the agency established in Iraq in 2003 to administer and rebuild Iraq, did not need to be resolved in the case but that "for the purposes of the False Claims Act," the CPA was an instrumentality of the United States.

05-Cummins-Chap05.indd 301 10/22/07 11:38:16 PM

Excerpts below from the 2006 district court decision explain its conclusion that the CPA was an international, not a U.S., entity and that the relators' evidence that Custer Battles had submitted claims to the CPA, without more, did not satisfy the FCA requirement that claims be presented to the U.S. government. (Some footnotes omitted.)

---

* * * *

. . . [J]ust as [31 U.S.C.] § 3729(a)(1) requires proof that false *claims* have been presented, or caused to be presented, to a United States government officer or employee working in his or her official capacity, § 3729(a)(2) also requires proof that any false *records or statements* were presented, or caused to be presented, to a United States government employee or officer working in their official capacity.

It follows, then, that if the CPA was an international entity, rather than a U.S. entity, submission of claims to the CPA, without more, would not satisfy the presentment requirement. In this event, it would be necessary for relators to show that by submitting the claim to the CPA, defendants caused the claim ultimately to be presented to a U.S. entity or to a U.S. officer or employee acting in her/his official capacity. Relators have failed in this respect. Relators have not pointed to any such evidence in the trial record, nor has an independent review of the record revealed that any such evidence was presented at trial. It is obvious, then, that unless the CPA is a U.S. entity, the defendants' Rule 50 motions must be granted on the ground that the presentment requirement has not been proved.

* * * *

. . . [T]he deferred question of the CPA's status can no longer be avoided. Fortunately, the issue was fully briefed and argued on summary judgment and was extensively discussed and analyzed in [*United States ex rel DRC, Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617 (E.D.Va. 2005) ("*DRC I*")], which analysis is instructive to quote here at length:

Discerning the status of the CPA is not an easy task. Relators and the government argue that the CPA is not a U.S. agency or

entity, but merely an "instrumentality of the United States."[14] In reaching this conclusion, the government observes that the CPA's creation was first announced by the Commander of the U.S. Central Command, was staffed, in large part, by employees of the United States government, and was led by a CPA Administrator appointed by and subject to the President. Moreover, not only did the United States have substantial influence and control over the CPA, but the CPA received a substantial part of its operating budget (approximately $1 billion) from Congress. In fact, Congress even purported to appropriate funds to the CPA "in its capacity as an entity of the United States." 118 Stat. at 1225. Thus, it is tempting to conclude that the CPA was merely an alter-ego, a tool, or an instrumentality of the United States.

Yet, one should not too hastily conclude that because the United States was the CPA's principal controller and contributor that it necessarily follows that the CPA is an instrumentality of the United States. For example, on this record, the CPA seems clearly different from the Commodity Credit Corporation (CCC), which was held to be an instrumentality of the United States in *Rainwater v. United States,* 356 U.S. 590, 592, 78 S. Ct. 946, 2 L. Ed. 2d 996 (1958). As noted in that decision, the CCC was established "by Congress" as a "wholly owned government corporation" with all funds coming and returning to the United States Treasury, and every officer and employee coming from the Department of Agriculture. 356 U.S. at 591-92 ("[CCC] is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds."). In sharp contrast, there is no dispute that the CPA was not established by Congress. Instead, as described in a letter to the United Nations, the CPA was an entity created by the United States, United Kingdom, and its Coalition partners "acting under existing command and control arrangements through the Commander of Coalition Forces." Moreover, the United Nations recognized the CPA, not as an instrumentality of the United States, but as an entity through which the Coalition

[14] The government was at great pains to emphasize that it takes this position for the purposes of the FCA only, and not for any other purpose.

> nations acted "as occupying powers under unified command." UNSCR 1483. And while the substantial majority of the CPA staff was comprised of United States employees, a significant portion—13%—hailed from other Coalition partners. Thus, the CPA may also be described as an international body formed by the implicit, multilateral consent of its Coalition partners, which would not be subject to the specific laws of its members states, including the FCA. Given the fluid nature of the conflict in Iraq and the challenges of establishing a new government in a war zone, it is not surprising that the organization of the CPA appears at times to have been ad hoc and to have relied heavily on the resources of its largest contributing member. Thus, it would seem that, like NATO or any other international organization created by the multilateral consent of multiple member nations, whether by treaty or otherwise, the CPA is not an instrumentality of each of its members states, distinctly subject to the laws of all of its members, but a wholly distinct entity that exercises power through a structure agreed to by its member states and that is subject to the laws of war and to its own laws and regulations. In any event, at this point, it is unnecessary to reach and decide this issue.

See id. at 649-50. From this, it is clear that although the CPA's status was not formally decided on summary judgment, the matter was thoroughly analyzed. And, indeed, the result of that analysis is clear—although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government. *See Rainwater,* 356 U.S. at 592-94. In fact, the evidence clearly establishes that it was created through and governed by multinational consent. . . . Thus, it follows that because the CPA was not a U.S. government entity, and therefore U.S. employees of the CPA were not working in their official capacity as employees or officers of the United States government, relators have demonstrably failed to provide sufficient evidence to enable a jury to find presentment, as required by both § 3729(a)(1) and § 3729(a)(2). Accordingly, the defendants' Rule 50(a) motions must be granted with respect to Counts I and II on the ground that relators failed

05-Cummins-Chap05.indd 304 10/22/07 11:38:17 PM

to produce sufficient evidence of presentment, and thus judgment as a matter of law must be entered for defendants on these counts. *See* Rule 50, Fed.R.Civ.P.

* * * *

2. Presidential Signing Statements

From time to time, in signing federal legislation into law, the President includes language in his signing statement preserving his constitutional prerogatives where he deems aspects of the legislation to be inconsistent with those prerogatives. *See Cumulative Digest 1991–1999* at 801–02. Two examples of such signing statements in the foreign affairs area during 2006 follow.

On October 13, 2006, President Bush signed into law H.R. 4954, the "Security and Accountability for Every Port Act of 2006," Pub. L. No. 109-347, stating that the act "strengthens the Government's ability to protect the Nation's seaports and maritime commerce from attack by terrorists." Among other things, the President stated:

> The executive branch shall construe as advisory provisions of the Act that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments, international organizations, or other entities abroad, that purport to direct executive branch officials to negotiate with foreign governments or in international organizations to achieve specified foreign policy objectives, or that purport to require the executive branch to disclose deliberations between the United States and foreign countries. Such provisions include subsections 205(d) and (i) and 803(b) of the Act; subsection 431(b) of the Homeland Security Act of 2002, as amended by section 301 of the Act; and subsection 629(h) of the Tariff Act of 1930, as amended by section 404 of the Act. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's

constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch.

The full text of the statement is available at 42 WEEKLY COMP. PRES. DOC. 1817 (Oct. 16, 2006).

On December 21, 2006, the President issued a statement on signing into law S.2370, the Palestinian Anti-Terrorism Act of 2006, which became Pub. L. No. 109-446. The full text of the President's statement, excerpted below, is available at 42 WEEKLY COMP. PRES. DOC. 2199 (Dec. 25, 2006).

Today I have signed into law S. 2370, the "Palestinian Anti-Terrorism Act of 2006." The Act is designed to promote the development of democratic institutions in areas under the administrative control of the Palestinian Authority.

Section 2 of the Act purports to establish U.S. policy with respect to various international affairs matters. My approval of the Act does not constitute my adoption of the statements of policy as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory. The executive branch will give section 2 the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

The executive branch shall construe section 3(b) of the Act, which relates to access to certain information by a legislative agent, and section 11 of the Act, which relates to a report on certain assistance by foreign countries, international organizations, or multilateral development banks, in a manner consistent with the President's constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

* * * *

The executive branch shall construe as advisory the provisions of the Act, including section 9, that purport to direct or burden the conduct of negotiations by the executive branch with entities abroad. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, including protection of American citizens and American military and other Government personnel abroad, and to supervise the unitary executive branch.

3. U.S. Sovereign Immunity in Foreign Relations Context

a. Passport-related

On October 20, 2006, before the Civil Court of the City of New York, Small Claims Part, the U.S. Government argued that the New York Passport Agency was immune in a suit seeking reimbursement of an airline ticket presumably related to federal government action regarding passport issuance. The case was discontinued by the claimant without prejudice at a court hearing on October 23, 2006. *Mangste W. El v. New York Passport Agency*, Index No. Msc 3879/06. On October 20, 2006, Daniel P. Filor, Assistant U.S. Attorney for the Southern District of New York, submitted an affirmation. While noting that the claimant had provided no facts and "there is no indication of the cause of action," the affirmation demonstrated that "the sovereign immunity of the United States deprives this Court of jurisdiction to hear a proceeding against the Federal Government. . . . Although Congress has enacted certain limited waivers of sovereign immunity, those waivers do not apply to claimants proceeding for various reasons but most obviously because Congress has not authorized such an action to be brought in state court." The full text of the affirmation is available at *www.state.gov/sl/c8183.htm*.

b. Foreign service officer in line of duty abroad

On June 7, 2006, the U.S. Court of Appeals for the Ninth Circuit granted a petition by Douglas Kent, a U.S. foreign service officer, for certification that he was acting within the scope of employment at the time of an automobile accident in Russia in which the occupant of another car was injured. *Kashin v. Kent*, 457 F.3d 1033 (9th Cir. 2006). As a result, the United States was substituted for Kent and the case was dismissed on grounds of sovereign immunity. At the time of the accident, the court explained:

> . . . Kent served as the Consul General of the United States to the Republic of Russia in the Far East Consular District . . . He was fully accredited as a diplomat and entitled to the fullest extent of consular immunity, including immunity from criminal prosecution. . . .
>
> The United States Department of State leased an apartment for Kent and provided him with a private driver and vehicle that Kent could use for any purpose, whether work or personal. When Kent first arrived in Russia, he used the private driver for all transportation. However, the budget and fiscal officer at the Moscow Embassy informed Kent that the Department of State wished to reduce the expenses of its missions overseas and indicated that the overtime expenses for Kent's personal driver were high due to Kent's late hours at work. Complying with the request that he reduce expenses, Kent had his personal vehicle shipped to Russia. The Department of State agreed to reimburse Kent for all mileage that he drove in his personal vehicle. . . .
>
> Days after Kent's vehicle arrived in Russia, Kent was involved in an automobile accident. Driving home from work late one evening, Kent stopped at a gym located on his way home. After leaving the gym, Kent pulled out in front of another vehicle . . . [causing a collision in which Kashin was injured.] . . .

Excerpts below provide the court's analysis of the Federal Tort Claims Act and the scope of employment for a foreign service officer abroad.

---

* * * *

The FTCA permits suits against the United States for injuries caused within a government employee's scope of employment. See 28 U.S.C. § 1346(b)(1). . . .

The FTCA, however, does not waive the sovereign immunity of the United States if the tort was committed in a foreign country. 28 U.S.C. § 2680(k). Where, as here, the tort was committed abroad, the scope of employment analysis remains the same, and, if the Department of Justice or the court certifies that the employee was acting within the scope of employment, the United States is substituted as the defendant. However, because the United States retains its sovereign immunity, the action will be dismissed. Thus, a grant of certification sounds the death knell for lawsuits involving foreign torts.

* * * *

The government contends that Kent was not acting within the scope of employment at the time of the accident. It argues that Kent's allegedly tortious conduct did not involve an activity that Kent was hired to perform—neither driving nor exercising at the gym was part of Kent's duties as the Consul General. The government therefore contends that the district court properly denied Kent's petition for certification. We disagree.

* * * *

The Department of State considered Kent "to be on duty twenty-four hours a day, seven days a week." 14 FAM § 418.2-1 (formerly 6 FAM § 228.2-1); *see also* 3 FAM § 4376 ("Because of the uniqueness of the Foreign Service, employees are considered to be on duty 24 hours a day. . . ."). . . . Kent was actually engaged in an act—transportation of a consul[] general—that the Foreign Affairs Manual labels as having a "business purpose": "Official vehicles may be used for the following business purposes: (1) Any

transportation [of] . . . consulates general is considered business use since these officers are considered to be on duty twenty-four hours a day, seven days a week. . . .” 14 FAM § 418.2-1. . . . Moreover, the Department of State exercises significant control over Kent, whether he is at or away from his office. The Foreign Affairs Manual limits with whom Kent may fraternize, *see* 3 FAM § 4377 # 5, governs the manner in which Kent operates a vehicle, *see* 3 FAM § 4377 # 20 (prohibiting “violation of traffic laws, safety regulations or instructions, or safe driving practices”), and designates how Kent must conduct himself at all times, *see* 3 FAM § 4377 # 40 (prohibiting “immoral, indecent, unethical, criminal, infamous, dishonest, or notoriously disgraceful conduct”); 3 FAM § 4139.10. These regulations are not empty threats. Indeed, Kent received from the Department of State a letter of reprimand arising from his traffic accident in Russia. The letter, of which we take judicial notice, warned Kent that his security clearance would be reduced or revoked if he does not “use better judgment in the future.”

* * * *

“[T]he ultimate question is whether or not it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.” Restatement (Second) of Agency § 229 cmt. a. In other words, is it just for the risk of loss from a Consul General’s transportation while stationed in Russia to be borne by the Department of State? There is little doubt that the Department of State itself considered the risk of a vehicular accident caused by Kent’s transportation to be a normal business risk—it hired a private driver for Kent to use for any purpose, and was therefore liable for all traffic accidents caused by Kent’s transportation. The Department of State did not shift its risk of loss to Kent by requesting that he drive his personal vehicle to save the Department of State expenses.

Therefore, because Kent was (1) engaged in a business act; (2) under the control of the Department of State; (3) acting in furtherance of the Department of State’s interest; and because (4) he subjectively believed he was acting within the scope of employment,

we hold that Kent was acting within the scope of employment when he was involved in the automobile accident.

* * * *

B. CONSTITUENT ENTITIES

1. Status of Puerto Rico

On November 15, 2006, the Senate Committee on Energy and Natural Resources held a hearing concerning the December 2005 report of the President's Task Force on Puerto Rico's Status. The Task Force was established by President Clinton in Executive Order 13183 of December 23, 2000 (68 Fed. Reg. 82,889 (Dec. 29, 2000)), as amended by Executive Order 13209 of April 30, 2001 (66 Fed. Reg. 22,105 (May 2, 2001)) and Executive Order 13319 of December 3, 2003 (68 Fed. Reg. 68,233 (Dec. 8, 2003)). The 2005 report of the task force is available at *www.house.gov/fortuno/pdf/PuertoRicoBooklet.pdf*.

Excerpts follow from the statement of C. Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, and co-chair of the President's Task Force on Puerto Rico's Status. The full text of the hearing, including testimony by Puerto Rican Governor Anibal Acevedo Vila, Ruben Berrios Martinez, President of the Puerto Rican Independence Party, and Luis Fortno, U.S. Representative, is available at 2006 WL 3324868 (F.D.C.H.).

---

* * * *

The status of Puerto Rico, and the options regarding that status, have been issues for many years. In 1992, for example, President George H.W. Bush issued a Memorandum that recognized Puerto Rico's popularly approved Commonwealth structure as "provid[ing] for self government in respect of internal affairs and administration," described Puerto Rico as "a territory," and directed the Executive Branch to treat Puerto Rico as much as

legally possible "as if it were a State." [28 Weekly Comp. Pres. Doc. 2324, dated November 30, 1992] He also called for periodically ascertaining "the will of its people regarding their political status" through referenda.

President Clinton, in his order establishing the Task Force, made it the policy of the Executive Branch "to help answer the questions that the people of Puerto Rico have asked for years regarding the options for the island's future status and the process of realizing an option." He charged the Task Force with seeking to implement that policy. We are required to "consider and develop positions on proposals, without preference among the options, for the Commonwealth's future status." Our recommendations are limited, however, to options "that are not incompatible with the Constitution and basic laws and policies of the United States."

On the same day that he issued his Executive Order, President Clinton also issued a Memorandum for the Heads of Executive Departments and Agencies regarding the Resolution of Puerto Rico's status [36 Weekly Comp. Pres. Docs. 3177 (Jan. 1, 2001)]. That memorandum added that "Puerto Rico's ultimate status has not been determined" and noted that the three major political parties in Puerto Rico were each "based on different visions" for that status. Although Puerto Rico held a plebiscite in 1998, none of the proposed status options received a majority. Indeed, "None of the Above" prevailed, because of objection to the ballot definition of the commonwealth option.

Some in Puerto Rico have proposed a "New Commonwealth" status, under which Puerto Rico would become an autonomous, non-territorial, non-State entity in permanent union with the United States under a covenant that could not be altered without the "mutual consent" of Puerto Rico and the federal Government. In October 2000, a few months before President Clinton established the Task Force, the House Committee on Resources held a hearing on a bill (H.R. 4751) incorporating a version of the "New Commonwealth" proposal. William Treanor, who held the same position in the Office of Legal Counsel that I now hold, testified that this proposal was not constitutional.

Thus, the Task Force's duties were to determine the constitutionally permissible options for Puerto Rico's status and to provide

recommendations for a process for realizing an option. We had no duty or authority to take sides among the permissible options.

The Task Force considered all status options, including the current status and the New Commonwealth option, objectively and without prejudice. We also attempted to develop a process for Congress to ascertain which of the constitutional options the people of Puerto Rico prefer. . . .

The Task Force issued its report last December and concluded that there were three general options under the Constitution for Puerto Rico's status: (1) continue Puerto Rico's current status as a largely self-governing territory of the United States; (2) admit Puerto Rico as a State, on an equal footing with the existing 50 States; or (3) make Puerto Rico independent of the United States.

As indicated in my discussion of the 1998 plebiscite and the origins of the Task Force, the primary question regarding options was whether the Constitution currently allows a "Commonwealth" status that could be altered only by "mutual consent," such that Puerto Rico could block Congress from altering its status. Since 1991, the Justice Department has, under administrations of both parties, consistently taken the position that the Constitution does not allow such an arrangement. The Task Force report reiterates that position, noting that the Justice Department conducted a thorough review of the question in connection with the work of the Task Force . . . [b]ut it does outline the reasoning, and it includes as appendices two extended analyses by the Clinton Justice Department. . . .

The effect of this legal conclusion is that the "New Commonwealth" option, as we understand it, is not consistent with the Constitution. Any promises that the United States might make regarding Puerto Rico's status as a commonwealth would not be binding. Puerto Rico would remain subject to Congress's authority under the Territory Clause of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Puerto Rico receives a number of benefits from this status, such as favorable tax treatment. And Puerto Rico may remain in its current Commonwealth, or territorial, status indefinitely, but always subject to Congress's ultimate authority to alter the terms of that

status, as the Constitution provides that Congress may do with any U.S. territory.

The other two options, which are explained in the report, merit only brief mention here. If Puerto Rico were admitted as a State, it would be fully subject to the U.S. Constitution, including the Tax Uniformity Clause. Puerto Rico's favorable tax treatment would generally no longer be allowed. Puerto Rico also would be entitled to vote for presidential electors, Senators, and full voting Members of Congress. Puerto Rico's population would determine the size of its congressional delegation.

As for the third option of independence, there are several possible ways of structuring it, so long as it is made clear that Puerto Rico is no longer under United States sovereignty. When the United States made the Philippines independent in 1946, the two nations entered into a Treaty of General Relations. Congress might also provide for a closer relationship along the lines of the "freely associated states" of Micronesia, the Marshall Islands, and Palau. The report explains, with a few qualifications, that, "[a]mong the constitutionally available options, freely associated status may come closest to providing for the relationship between Puerto Rico and the United States that advocates for 'New Commonwealth' status appear to desire."

With regard to process, the Task Force focused on ascertaining the will of the people of Puerto Rico. In particular, we sought to ascertain that will in a way that, as the report puts it, "provides clear guidance for future action by Congress. . . ."

We therefore have recommended a two-step process. The first step is simply to determine whether the people of Puerto Rico wish to remain as they are. We recommend that Congress provide for a federally sanctioned plebiscite in which the choice will be whether to continue territorial status. If the vote is to remain as a territory, then the second step, one suggested by the first President Bush's 1992 memorandum, would be to have periodic plebiscites to inform Congress of any change in the will of the people. If the first vote is to change Puerto Rico's status, then the second step would be for Congress to provide for another plebiscite in which the people would choose between statehood and independence, and then to begin a transition toward the selected option. Ultimate authority of course remains with Congress.

05-Cummins-Chap05.indd 314 10/22/07 11:38:18 PM

Two points about this recommended process merit brief explanation. First, consistent with our presidential mandate, it does not seek to prejudice the outcome; it is structured to produce a clear outcome. At least once before, Puerto Ricans have voted by a majority to retain their current Commonwealth status. They may do so again. But it is critical to be clear about that status. Second, our recommended process does not preclude action by Puerto Rico itself to express its views to Congress. At the first step, we recommend that Congress provide for the plebiscite "to occur on a date certain." We did not, of course, specify that date. But if Congress wished to ensure that some action occurred but not preclude the people of Puerto Rico from taking the initiative, it could allow a sufficient period for local action before that "date certain." If such action occurred and produced a clear result, there might be no need to proceed with the federal plebiscite.

* * * *

2. Commonwealth of the Northern Mariana Islands: Claim to Submerged Lands

On February 24, 2005, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court ruling granting summary judgment in favor of the United States in a case in which the Commonwealth of the Northern Mariana Islands ("CNMI") attempted to establish that the CNMI rather than the United States was the owner of certain submerged lands. *Commonwealth of the Northern Marianas Islands v. United States*, 399 F.3d 1057 (9th Cir. 2005).

The Supreme Court denied certiorari on March 20, 2006, 126 S. Ct. 1566 (2006). *See also Digest 2005* at 251-55, *Digest 2003* at 275-76 and *Digest 2002* at 246-59. At the request of the Supreme Court for its views, the United States filed a brief in opposition to the grant of certiorari on February 17, 2006. The United States argued that "[t]he court of appeals correctly ruled that the United States has acquired and retained paramountcy over the submerged lands seaward of the CNMI's coastline and that federal law preempts the CNMI's legislative attempts to assert jurisdiction over those lands.

That decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted." The full text of the U.S. brief is available at *www.usdoj.gov/osg/briefs/2005/oresponses/2005-0457.resp.pdf*.

3. Republic of the Marshall Islands

During 2006 actions were filed in the U.S. Court of Federal Claims against the United States by citizens of the Republic of the Marshall Islands ("RMI") asserting claims related to U.S. nuclear testing from 1946-1958 in the Marshall Islands. *People of Bikini v. The United States*, No. 06-288C and *Ismael John v. The United States*, No. 06-289L. In September 2006 the United States filed motions to dismiss the claims (on September 15, in *People of Bikini* and on September 18, 2006, in *Ismael John*). Although *Ismael John* asserts claims arising on Enewetak Atoll, rather than Bikini Atoll, the issues in the two cases are substantially similar. Excerpts below from the U.S. submission in *People of Bikini* describe the case and provide the views of the United States that the cases must be dismissed (footnotes and most citations to the complaint and amended complaint omitted). The full text of both submissions is available at *www.state.gov/s/l/c8183.htm*.

* * * *

I. Nature of the Case

This is another in a series of actions brought by or on behalf of the citizens of the Marshall Islands resulting from the United States' nuclear testing program conducted in the Marshall Islands between June 1946 and August 1958. Plaintiffs in this action contend that the United States' alleged failure or refusal to fund adequately an award of the Nuclear Claims Tribunal issued on March 5, 2001,*

* Editor's note: The Nuclear Claims Tribunal was established in 1987 by RMI's Nuclear Claims Tribunal Act to determine the nature and extent of the damages resulting from the nuclear testing program and to award compensation from the $150 million Trust Fund.

05-Cummins-Chap05.indd 316 10/22/07 11:38:19 PM

constituted a taking of their claims without just compensation in violation of the Fifth Amendment; a breach of fiduciary duties created by a 1946 implied in fact contract to provide for their care and well being; a breach of implied duties and covenants of that contract; and a breach of implied duties and covenants as third party beneficiaries of agreements between the United States and the Republic of the Marshall Islands ("RMI") that became effective in 1986. In the alternative, plaintiffs contend that these agreements constitute a taking of the Bikini Atoll and related property without just compensation and breaches of fiduciary duties arising from the 1946 implied contract. Plaintiffs seek $561,036,320, which is the amount awarded in the decision and order of the Nuclear Claims Tribunal minus the amounts paid by the Tribunal to date.

* * * *

III. Statement Of Facts
A. Removal From Bikini Atoll And Nuclear Testing

* * * *

Between June 1946 and July 1958, the United States tested 23 atomic and hydrogen bombs at Bikini Atoll. According to plaintiffs, "[t]he nuclear tests caused severe, extensive, and long-lasting damage to Bikini Atoll," including its islands and lagoon. In 1958, President Dwight D. Eisenhower declared a moratorium on United States atmospheric nuclear testing, including on the Marshall Islands.

The United States began moving Bikinians back to the atoll in 1969, following a report of the Atomic Energy Commission that found that returning to Bikini Atoll would not constitute a "significant threat" to Bikinians' health and safety. Plaintiffs filed a lawsuit in district court in 1975 seeking to compel the United States to conduct a comprehensive radiological survey of Bikini Atoll. The litigation was dismissed following agreement to conduct the survey. *Id*. Subsequently, United States physicians discovered significant increases in the amounts of radioactive cesium-137 in Bikinians who had returned to the atoll. Therefore, in August 1978, the United States again evacuated the Bikinians from the atoll, relocating some to Ejit Island in Majuro Atoll and others back to Kili Island.

B. Political Control And The Compact Of Free Association

The United States entered into an agreement with the United Nations ("U.N.") on July 18, 1947, under which Micronesia became a United Nations strategic trust territory administered by the United States. Am. Compl. ¶ 39 (citing Trusteeship Agreement for the Former Japanese Mandated Islands ("Trusteeship Agreement"), 61 Stat. 3301, T.I.A.S. No. 1665 (1947)). The United States initially exercised authority over the Trust Territory of the Pacific Islands through the High Commissioner, who was appointed by the President with the advice and consent of the United States Senate. On November 3, 1986, the President declared that the United States had fulfilled its obligations under the Trusteeship Agreement and that the Agreement was no longer in effect as of October 21, 1986. The U.N. Security Council announced termination of the Trusteeship Agreement on December 22, 1990, and admitted RMI into the United Nations on August 9, 1991.

By 1978, the Trust Territory fragmented politically into four governmental entities: the Northern Mariana Islands, Palau, the Marshall Islands, and the Federated States of Micronesia. The Northern Marianas ultimately achieved commonwealth status, while the remaining governmental entities chose "free association," a political status recognized by the U.N. General Assembly. *Id*. Plaintiffs' government, RMI, negotiated a new political relationship with the United States, provided in a Compact of Free Association ("Compact") that it initialed in 1980. The Compact was signed by both governments on June 25, 1983; the Marshall Islanders approved it by a plebiscite in September 1983. Congress approved a version of the Compact in December 1985, and the President signed the Compact of Free Association Act into law on January 14, 1986.

Pursuant to section 177(a) of the Compact:

> The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands . . . for loss or damage to property and person of the citizens of the Marshall Islands . . . resulting from the nuclear testing program which the Government of the

> United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.

Compact of Free Association Act of 1985 (the "Compact Act"), Pub. L. No. 99-239, 99 Stat. 1770 (Jan. 14, 1986), Tit. I, Art. VII, § 177(a)) (the Compact Act has been codified beginning 48 U.S.C. § 1901; *see* 48 U.S.C.A. § 1901 note).

Section 177(b) of the Compact Act provides that the United States and the Marshall Islands would negotiate a separate agreement for the "just and adequate settlement of all [personal injury and property damage] claims" resulting from the United States' nuclear testing program. *Id*. (citing Compact Act § 177(b)). Pursuant to section 177(b), the governments negotiated a separate "Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association" ("Section 177 Agreement"). The Section 177 Agreement established a $150 million trust fund ("Trust Fund"), the income from which was earmarked, in part, for distribution to the people of Bikini, Enewetak, Rongelap and Utrik and the Nuclear Claims Tribunal. The agreement allocated $75 million to the Bikini Distribution Authority in payment of claims for loss or damage to property and the people of Bikini, to be disbursed in quarterly amounts of $1.25 million for a 15-year period, and to be "distributed, placed in trust or otherwise invested as the Bikini Distribution Authority may determine consistent with this Agreement."

Article X of the Section 177 Agreement, entitled "Espousal," provides:

> Section 1 - Full Settlement of All Claims
>
> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which

> may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Article XI of the Agreement provides that the Marshall Islands shall indemnify and hold harmless the United States for any liability it may incur on Article X claims, up to $150 million.

Article XII of the Section 177 Agreement, entitled "United States Courts," provides:

> All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction to entertain such claims*, and any such claims pending in the courts of the United States shall be dismissed.

The Compact of Free Association Act incorporates the Section 177 Agreement by reference, and reiterates the intent of Congress to achieve a "full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred. . . ." *See* 48 U.S.C. § 1903(g).

* * * *

E. The Changed Circumstances Request And Political Solution

On September 11, 2000, the RMI government presented to the United States Congress what RMI characterized as a changed circumstances petition pursuant to Article IX [of the Section 177 Agreement]. RMI requested that the awards granted by the Tribunal be paid by Congress because of changed circumstances and because the Tribunal did not have the funds to pay the awards. *Id*. On January 24, 2005, in response to Congress' asking the Administration for an evaluation of RMI's request, the Department of State advised Congress that RMI's request did not qualify as "changed circumstances" within the meaning of Article IX of the Section 177 Agreement. *Id*.

The governments of the United States and RMI recently negotiated amendments to the Compact for Free Association.

05-Cummins-Chap05.indd 320 10/22/07 11:38:19 PM

Pub. L. No. 108-188, 2003 H.J.Res. 63 (Dec. 17, 2003), 117 Stat. 2720 (codified at 48 U.S.C.A. § 1921 note). The amended Compact provides, among other things:

> The Compact, as amended, makes no changes to, and has no effect upon, Section 177 of the Compact, nor does the Compact, as amended, change or affect the separate agreement referred to in Section 177 of the Compact including Articles IX and X of that separate agreement, and measures taken by the parties thereunder.

Pub. L. No. 108-188, . . . Tit. I, Art. VII, § 177.

ARGUMENT

* * * *

I. The Complaint Must Be Dismissed For Lack Of Jurisdiction

. . . Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. . . . A waiver of sovereign immunity cannot implied, but must be unequivocally expressed. . . .

* * * *

B. Congress Withdrew The Jurisdiction Of The Courts To Hear Claims Arising From The Nuclear Testing Program

As plaintiffs acknowledge in their complaint, this Court previously decided that it no longer possesses jurisdiction over claims arising from the nuclear testing program conducted in the Marshall Islands, pursuant to the Compact Act and the Section 177 Agreement.; *see Juda II*, 13 C1.Ct. at 689; *Peter*, 13 Cl. Ct. 691 (1987); *Nitol*, 13 Cl. Ct. 690 (1987). The Court of Appeals for the Federal Circuit agreed, adopting the Claims Court's analysis in *Juda II*. *People of Enewetak*, 864 F.2d at 136-37. Other courts that have considered the issue also held that the Compact Act and Section 177 Agreement withdraw from courts in the United States jurisdiction over claims arising from the nuclear testing program. . . . Because Congress has not restored jurisdiction over these claims in courts of the United States, this action must be dismissed for lack of subject matter jurisdiction.

Moreover, plaintiffs are bound by the Courts' prior rulings, which addressed the very same issue. . . .

* * * *

C. This Action Presents A Nonjusticiable Political Question And Should Be Dismissed Because Only Congress May Grant A Remedy, If Any Is Due

This action raises a nonjusticiable political question and should be dismissed because plaintiffs' remedy, if any remedy is due from the United States, is within the discretion of Congress and the Executive Branch, and not the courts. Plaintiffs allege, among other things, that the United States' failure or refusal to fund adequately the award issued by the Tribunal constitutes a taking of their claims, a breach of fiduciary duties created by the 1946 implied in fact contract, and a breach of implied duties and covenants of that contract. Plaintiffs contend that the United States now is obligated to pay over $561 million more than the amount agreed upon in the Section 177 Agreement, as well as in the 1988 special appropriations for the people of Bikini. The basic tenet underlying plaintiffs' claims, therefore, is that the $150 million and $90 million settlement funds established under the Section 177 Agreement proved inadequate. Because this action challenges the propriety of an agreement entered into by the governments of the RMI and the United States, it should be dismissed pursuant to the political question doctrine.

The United States Supreme Court has long recognized that certain political decisions are committed to the political branches of Government, to the exclusion of the judiciary. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803). . . . "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). . . .

This case presents a number of the factors [set forth in *Baker*]. Plaintiffs' attack upon the Section 177 Agreement – an agreement that was negotiated and executed by the Executive Branch and

approved by Congress – calls into question the conduct of United States foreign relations. Moreover, plaintiffs challenge the Compact Act and the Section 177 Agreement, which were negotiated between the United States and RMI. These types of government-to-government negotiations are "within the sole authority of the Executive." *Kwan v. United States*, 272 F.3d 1360, 1364 (Fed. Cir. 2001) . . . Thus, there is a "textually demonstrable constitutional commitment of the issue" to Congress and the Executive Branch, the first *Baker* factor. 369 U.S. at 217. Because this action challenges the propriety of an agreement entered into by the governments of RMI and the United States, it should be dismissed pursuant to the political question doctrine.

In addition, the Court could not undertake independent resolution of the claims without expressing lack of respect due coordinate branches of Government, or the potentiality of "embarrassment from multifarious pronouncements by various departments on one question." *Id.;* . . . These factors are particularly applicable in this case because Article IX of the Section 177 Agreement provides an avenue for presenting a request to Congress for its consideration. The RMI has availed itself of that avenue.

Allowing this action to proceed would express disrespect for both the Legislative and Executive Branches of Government. It would signal to Congress this Court's belief that Congress will not appropriately act upon RMI's request for additional funds. Moreover, allowing this action to proceed would express disrespect for the prior Administration and Congress that negotiated, entered into, and enacted the Compact, the Section 177 Agreement, and the Compact Act. The fourth *Baker* factor, therefore, mandates dismissal.

Furthermore, permitting this action to proceed would create a significant risk of "multifarious pronouncements by various departments" of Government because RMI's request remains pending before Congress. *Baker*, 369 U.S. at 217. This Court could render a decision that directly conflicts with Congress' disposition of RMI's request, causing confusion, embarrassment, and more litigation. This action, therefore, should be dismissed pursuant to the sixth *Baker* factor. . . .

Because the propriety of international agreements, such as the Compact and Section 177 Agreement that plaintiffs challenge, falls within the discretion of Congress and the Executive Branch, this

action raises a political question and must be dismissed. If not dismissed, it would be impossible to decide the issues presented without showing a lack of respect for both Congress and the Executive Branch, and there is a real risk of causing embarrassment from multifarious decisions.

* * * *

II. The Complaint Also Should Be Dismissed For Failure To State A Claim Upon Which Relief Can Be Granted

* * * *

B. Plaintiffs Fail To Allege The Occurrence Of Any Federal Government Act Since 1986 That Has Deprived Them Of Any Property Interest

. . . [P]laintiffs' allegations hinge upon the United States' entry into the Compact agreements in 1986 and, therefore, they are barred by, among other reasons, the six-year statute of limitations. Additionally, plaintiffs fail to allege the occurrence of any Federal Government act since 1986 that has deprived them of any property interest. Therefore, plaintiffs' taking claims (counts I and V) also should be dismissed because they fail to state a claim upon which relief may be granted.

* * * *

Plaintiffs, here, cannot avoid the fact that their own government agreed to the amounts specified in the Compact agreements. Thus, if plaintiffs have any viable claim, it is against RMI, and not the United States. Because plaintiffs fail to identify any affirmative act by the United States that potentially could result in a taking, counts I and V should be dismissed for failure to state a claim, pursuant to RCFC 12(b)(6).

C. Plaintiffs Cannot Establish An Implied In Fact Contract For Additional Funds Because The Compact Agreements Constitute Full Settlement Of All Claims Arising Out Of Or Related To The Nuclear Testing Program

Plaintiffs also fail to allege claims pursuant to their implied in fact contract theories upon which relief may be granted. As demonstrated above, any implied in fact contract that may have existed

between the United States and the people of Bikini was terminated in 1986 by the Compact agreements. . . .

* * * *

Plaintiffs' implied contract and breach claims, including their third-party beneficiary claim (count IV), also fail because both the 1946 implied in fact contract and the Compact agreements deal with the same subject matter, that is compensation for the effects of the United States' nuclear testing program. As this Court has noted:

> The Federal Circuit . . . has repeatedly instructed that "[t]he existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract."

L.P. Consulting Group, Inc. v. United States, 66 Fed. Cl. 238, 242 (2005) (quoting *Atlas Corp. v.United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990) (other citations omitted)).

Thus, plaintiffs have failed to allege implied in fact contract claims for which they are entitled to any additional relief from the United States. Accordingly, the Court should dismiss these claims pursuant to RCFC 12(b)(6).

* * * *

Cross References

Role of treaty and ICJ decisions in U.S. law, **Chapter 2.A.1.**
Presidential statements concerning constitutional authorities in legislation, **Chapters 3.B.4.b., 16.A.5.b. and 18.C.2.c.(2).**
Application of CERCLA to Canadian firm not extraterritorial on facts of the case, **Chapter 13.A.1.**
Status of Multinational Forces – Iraq, **Chapter 18.A.4.e.(1).**

05-Cummins-Chap05.indd 326 10/22/07 11:38:20 PM

Chapter 6

Human Rights

A. GENERAL

1. Human Rights Reports

On March 8, 2006, the Department of State released the 2005 Country Reports on Human Rights Practices. The document is submitted to Congress annually by the Department of State in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The report is available at *www.state.gov/g/drl/rls/hrrpt/2005/*.

On April 5, 2006, the Department of State submitted its report "Supporting Human Rights and Democracy: The U.S. Record 2005-2006," in compliance with Section 665 of P.L. 107-228, the Fiscal Year 2003 Foreign Relations Authorization Act, which requires the Department to report on actions taken by the U.S. Government to encourage respect for human rights. The report and related statements are available at *www.state.gov/g/drl/rls/shrd/2005*.

06-Cummins-Chap06.indd 327 10/22/07 11:40:13 PM

2. Human Rights Council

a. Establishment

On March 15, 2006, the UN General Assembly adopted Resolution 60/251, creating the Human Rights Council. ("HRC"). U.N. Doc. A/RES/60/251. In operative paragraph 1 of the resolution, the General Assembly decided to "establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly. . . ." *See also Digest 2005* at 460-62 concerning the decision to create the HRC and U.S. views. The HRC held three regular sessions during 2006: June 21-July 6, September 19-October 6, and November 29-December 8, 2006. It also held four special sessions, discussed in b.(2) below.

In addition to the general issues addressed here, U.S. positions concerning specific issues addressed by the HRC in 2006 are reported under relevant substantive headings below.

b. U.S. statements

(1) Composition and procedures

On April 6, 2006, Department of State Spokesman Sean McCormack issued a press release announcing that the United States would not seek election to the HRC in 2006, stating:

> The United States will not run for a United Nations Human Rights Council seat in the Council's first election, scheduled for May 9, 2006. There are strong candidates in our regional group, with long records of support for human rights, that voted in favor of the resolution creating the Council. They should have the opportunity to run.

The full text of the press release is available at *www.state.gov/r/pa/prs/ps/2006/64182.htm*.

In a letter to foreign ministers of other UN member states dated April 13, 2006, Secretary of State Condoleezza Rice set forth the U.S. pledge to support the candidacy of states committed to human rights for membership in the HRC. The text of the letter, set forth below, is available at *www.state.gov/secretary/rm/2006/64594.htm*.

The United States remains committed to supporting the United Nations' historic mission to promote and protect the human rights of all the world's citizens. The UN Charter and the Universal Declaration of Human Rights as well as the Community of Democracies' Final Warsaw Declaration of June 27, 2000, and the Inter-American Democratic Charter, adopted in Lima, Peru, on September 11, 2001, recognize the inherent dignity, human rights and fundamental freedoms of every person. These include:

- the right to choose their representatives through regular, free and fair elections based on secret balloting;
- a pluralistic system of political parties;
- freedom of expression, opinion, thought, conscience and religion;
- freedom of peaceful assembly and association;
- freedom from arbitrary arrest or detention;
- freedom from torture and other cruel, inhumane or degrading treatment or punishment;
- a competent, independent and impartial judiciary;
- government institutions that are transparent, participatory and fully accountable to the citizenry;
- including civilian control over the military;
- a free civil society; and
- an active and independent media.

The United States believes that the United Nations and its Member States have a critical role to play in advancing these rights, freedoms, and institutions. The United States will work cooperatively with other Member States to make the new UN Human Rights Council strong and effective. In particular, we must work to

ensure that countries elected to the Council uphold the highest standards of human rights.

To help ensure a Council committed to and effective in promoting fundamental freedoms and human rights, the United States makes the following pledge:

> In elections to the Human Rights Council, the United States commits to support those States with a genuine commitment to human rights.
>
> The United States will not support the candidacies of states that systematically abuse human rights, including countries that are the subject of measures under Articles 41 and 42 of the UN Charter, where human rights abuses or sponsorship of terrorism are cited.

The United States welcomes similar commitments already made by some nations and urges other nations to undertake publicly such pledges, as a means of strengthening the Human Rights Council.

On September 6, 2006, Mark Lagon, Deputy Assistant Secretary of State for the Bureau of International Organization Affairs, and Erica Barks-Ruggles, Deputy Assistant Secretary of State for Democracy, Human Rights and Labor Bureau, testified at a hearing entitled "UN Human Rights Council: Reform or Regression" before the House International Relations Committee, Sub-Committee on Africa, Global Human Rights and International Organizations. The full texts of their testimony, excerpted below, are available at *www.usmission.ch/Press2006/0906LagonTestimonyHRC.html* and *www.usmission.ch/Press2006/0906EricaBarksRugglesHRC.html.*

Mr. Lagon

* * * *

. . . The United States is committed to improving this United Nations body, although unfortunately the new Council's sessions so far have been disappointing. Much work remains to be done if

the new Council is to become an improvement over its discredited predecessor, and we will work to make this United Nations body live up to its noble calling.

* * * *

History of UN Human Rights Machinery

The United Nations was founded in the aftermath of the Second World War, to help prevent conflicts and assist nations in meeting the needs and aspirations of their people and to protect their human dignity. The United Nations Charter specifically called for the creation of a Commission for the promotion of human rights, thereby establishing this function as one of the United Nations' founding priorities. Indeed, with the leadership of Eleanor Roosevelt, the Commission on Human Rights was one of the first two functional commissions set up at the UN. In its early days, the Commission successfully negotiated the Universal Declaration of Human Rights, which for the first time defined international standards and understanding of human rights. This history demonstrates the importance the UN placed on the promotion of human rights in its early years.

* * * *

Membership Criteria for New Body

The resolution creating the Council was crafted over the course of several months in New York. The U.S. called for improving the body's membership through two essential means: requiring election of members by two-thirds of UN Member States present and voting, and barring the membership of countries subject to UN Security Council sanctions, under Chapter VII of the UN Charter, for human rights abuses or acts of terrorism. We needed to make sure that the CHR's successor was populated by firefighters, not arsonists. Unfortunately, the negotiated text did not include these criteria and we ultimately called for a vote and voted "no" on the resolution establishing the Council. The Secretary General had set the goal of creating a body definitively better than the Commission. A historic opportunity was squandered, with the acquiescence of

some of our high-minded friends who were willing to settle for "good enough.". . .

* * * *

Composition of Council

Another important difference between the former Commission and the new Council, one which has greatly influenced the actions of the Council thus far, is its composition. The regional distribution of seats in the Council is patterned after the General Assembly rather than the previous allocation which existed at the Commission. The Commission's membership contained a greater proportion of members from areas of the world that generally respect and promote fundamental freedoms and human rights: the Western European and Other Group – or WEOG – which includes the United States, and the Group of Latin America and the Caribbean – or GRULAC. However, when the General Assembly made the new Human Rights Council a subsidiary body, it decided to give the Council the same geographic distribution of seats as the General Assembly. This had the effect of raising the overall percentage of African, East European and Asian members, regions with mixed records on human rights, on the Council. At the same time, the percentage of countries from the Western Europe and Other Group and the Latin American and Caribbean Group declined.

This is significant because many African and Asian countries tend to favor economic, social, and cultural rights over civil and political rights. These regional groups have historically sought to eliminate country-specific resolutions, which the U.S. has always considered a crucial human rights tool. And the current composition of the Council has also given the Organization of Islamic Conference greater influence, allowing it to focus disproportionately on the Israeli-Palestinian conflict at the expense of other troubling situations around the globe. . . .

* * * *

Council Mechanisms

Two important processes are in development at the Council at this time: the establishment of a new Universal Periodic

Review (UPR) mechanism and the review of all mandates of the previous commission. In open-ended consultations taking place throughout the year, the U.S. is a full participant and our diplomatic mission is vigorously promoting the U.S. position.

We believe that the Universal Periodic Review must be a real "peer review" process. Governments should run the UPR. Although the review sessions would ideally be open to the public, welcoming individual experts and civil society organizations to provide input to the process and observe the proceedings, it should be undertaken by and for States. Second, we seek to ensure that nations are judged solely on the basis of treaties that they have ratified. Third, we would like the review of all UN Member States to occur within five years and be of limited expense, and so suggest that this work be conducted intersessionally to prevent it from precluding other important work of the Council. Our most important criterion for the UPR is that it should not be allowed to crowd out time spent in the Council on important technical assistance to transitioning governments or frank condemnations of heinous abusers.

Meanwhile, as noted, in this first year the Council also is reviewing all special procedures from the Commission on Human Rights to improve upon and rationalize their work. Our objective is to maintain a system of special procedures, expert advice, and an individual complaint procedure. Our Mission in Geneva is fighting to preserve the Special Rapporteurs who examine country-specific situations and to reduce the number of thematic mandates that address economic, social, and cultural rights of questionable merit. . . .

* * * *

Conclusion

The Secretary General and High Commissioner for Human Rights said in the context of retiring the Commission and creating a Council that the era of norm-setting—or inventing treaties and passing lofty rhetorical statements—should be succeeded by an era of implementation of human rights. The United States welcomes this approach.

. . . Many of the Council's collective decisions have been troubling, even if the records of its individual members represent a slight improvement over those of the now defunct Commission.

Still, the requirement for more votes to win a seat on the Council, new precedents such as individual voting for Council members, competitive regional slates for elections, and public pledges by candidates, offer some hope that the membership can be improved further in the future. And, as I described, new Council mechanisms such as the Universal Periodic Review are being established. They, too, may improve the Council's record on promoting and protecting human rights. The United States will work hard with our partners in the days and weeks ahead to convert these hopes into the reality of a truly improved UN Human Rights Council.

* * * *

Ms. Barks-Ruggles

* * * *

. . . [S]ome countries with very troubling human rights records, such as Egypt, Eritrea, Guinea, Nepal, Zimbabwe and—most notably—Sudan, decided not to run for re-election. . . . [W]e believe these countries chose not to run because they had doubts that they could be elected to the new, somewhat smaller and more selective body. . . .

* * * *

Regrettably, and despite all the changes I have outlined, some notorious human rights violators such as Cuba and China were still elected to the Human Rights Council. . . .

In analyzing whether we succeeded in our objective of improving the membership of the UN's premier human rights body, however, it is also important to review not just the individual records of its members, but also their collective aspirations and actions. And this is where we run into serious questions about the record of the Human Rights Council thus far. . . . [T]hirty-four member states from Africa, Asia and Eastern Europe—regions with mixed human rights records—were elected to the Council. This increase has proven to be significant in the actions taken by the Council since its inauguration in June. In the new HRC only 16 members of the Human Rights Council are needed to call special sessions. Those 16 votes were easily mustered this summer as the Council

called successfully for two special sessions on Israel in the first eight weeks of the Council's existence. . . .

* * * *

The United States remains seriously concerned about the Human Rights Council's unnecessary focus on Israel. We believe the Human Rights Council must exercise its responsibility to promote and protect human rights even-handedly. The decisions to hold these two special sessions and the imbalanced resolutions adopted there were regrettable. However, the United States firmly believes that the special sessions mechanism – if used properly to address egregious cases – should and can be a valuable tool in the promotion and protection of human rights. We are prepared to support calls for future special sessions on countries where there are serious and emerging human rights abuses, and are actively discussing possibilities with like-minded countries.

Finally, when a country refuses to cooperate with the Council and the international community, the Council retains the option of condemnatory resolutions. . . . The United States very much supports resolutions that call to account the worst violators of the universally accepted human rights and fundamental freedoms of their people, especially those that refuse to cooperate with the Council.

* * * *

(2) Special sessions

During 2006 the HRC held four special sessions. The first three focused on Israel (two in relationship to Palestinian Territories and one in relationship to Lebanon) and the fourth on Darfur. For further discussion of conflicts between Israel and the Palestinian Authority and Israel and Lebanon, *see* Chapters 17.A.2. and 3. and 18.A.6. and 7.

(i) Occupied Palestinian Territories

As discussed in the testimony *supra,* in July 2006 the HRC called its first special session, on the human rights situation

in the Occupied Palestinian Territories. Ambassador Warren W. Tichenor, Permanent Representative of the United States of America To the United Nations and Other International Organizations in Geneva, addressed the special session on that date, as excerpted below. The full text is available at *www.usmission.ch/Press2006/0705TichenorPalestineStatement.html. See also* statement to the press, July 6, 2006, available at *www.usmission.ch/Press2006/0705TichenorPress.htm and www.usmission.ch/Press2006/0929TichenorOPT.htm.*

Mr. President, the United States regrets that we must be here today for a special session to address the human rights situation in the Occupied Palestinian Territories.

I say regret, because my government does not believe that a special session should focus only on one aspect of this situation, precipitated by the kidnapping of a young Israeli soldier—which was indefensible—while ignoring the role of Hamas in the kidnapping, and the failure of the Palestinian Authority government to denounce terror. Further, this session fails to take into account the continued role of Syria in harboring and supporting rejectionists.

As Secretary Rice has noted, "It is extremely important that every party act responsibly so that the possibility of peace will be preserved." My government continues to call on Israel to exercise restraint at this very difficult time, because restraint is the only way to ensure that hope for a future peace process can survive intact. The Government of Israel has indeed taken steps to spare lives and harm in its recent operations. We are working with the Government of Israel and the donor community on the ground to help address the humanitarian situation in Gaza. And we continue to support President Mahmoud Abbas, who was elected on and remains committed to a platform of peace. It is our profound hope that both sides will focus attention on the way forward. To security. To a lasting peace as called for in the Roadmap. This begins with the return of the Israeli soldier.

* * * *

In November the HRC again called a special session on the Occupied Palestinian Territories. In a statement delivered to

the HRC on November 15, 2006, Ambassador Tichenor addressed U.S. concerns as excerpted below. The full text is available at *www.usmission.ch/Press2006/1115TichenorGaza.html.*

On November 8, Israeli artillery shells were fired into a residential area of Beit Hanoun, killing 17 civilians. The injuries and loss of life, and especially the deaths of a number of young children, were tragic. That day, President Bush conveyed deepest condolences on behalf of the United States. The President called on all parties to act with care so as to avoid any harm to innocent civilians. We have seen the Israeli government's apology and understand an investigation has begun. We hope it will be completed quickly and that appropriate steps be taken to avoid a repetition of this tragic incident.

* * * *

In the text before us, rather than attempting honestly to shed light on all the facts contributing to the violence in Gaza, the resolution instead is a blatant effort to exploit the tragic incident in Beit Hanoun to advance an unbalanced view of the Israeli-Palestinian conflict.

In the wake of the Beit Hanoun attacks, Hamas' leadership declared that the truce with Israel was over and the armed struggle could resume; and Hamas' military wing called on Muslims worldwide to strike American targets and interests. We strongly reject such calls. More terror, whether directed at Israel or the United States or elsewhere, is not the solution nor will it enable the Palestinian people to achieve their aspirations. It is the responsibility of the Hamas-led PA government to prevent terror, take the necessary steps to stop attacks such as occurred this morning in Sderot, and dismantle terrorist infrastructure. Progress towards peace needs a Palestinian government that disavows terror and violence and accepts the principles outlined by the Quartet.

* * * *

On the same date, the Department of State released a statement by Tom Casey, Deputy Spokesman, as set forth

below and available at *www.usmission.ch/Press2006/1115CaseyHRC.html.*

The United Nations Human Rights Council convened today, for the third time in less than six months, a special session that addresses only Israel, and attempts to advance an imbalanced view of the Israeli-Palestinian conflict. The Council's persistence in focusing on Israel, while failing to address serious human rights violations taking place in other countries and regions, including Sudan, Burma, North Korea, and Cuba, undermines its credibility and its ability to defend human rights around the world.

The democratic states on the Council must work to redirect its course. The United States calls on the Council to focus on the most pressing human rights violations, and to approach its work with the seriousness and lack of selective bias the international community expects. Otherwise, the legitimacy of the body will be called into question.

(ii) Lebanon

On August 11, Ambassador Tichenor addressed the HRC special session on Lebanon, expressing U.S. concerns with the use of the special session mechanism for this purpose. Ambassador Tichenor's statement is set forth below in full and available at *www.usmission.ch/Press2006/0811TichenorCouncil.html.*

. . . [T]he United States . . . is deeply concerned about the suffering of innocent Lebanese and Israeli civilians, extensive damage to civilian infrastructure, and the displacement of hundreds of thousands of persons. The human costs in both Lebanon and Israel have been tremendous. We and other members of the Security Council are working around the clock to bring a sustainable end to the violence. We continue to work with the Governments of Lebanon and Israel and others on the ground to help address the humanitarian situation in Lebanon.

We believe that this Special Session is unhelpful and potentially counter-productive to the Security Council's efforts to address the

complex issues involved in this conflict, taking into account the views of Lebanon and Israel—in search of a durable settlement.

The United States remains firm in our belief that the special sessions mechanism is can invaluable tool in the promotion and protection of human rights. The Council must, however, act responsibly—for impartiality and non-selectivity.

* * * *

The draft resolution unfairly condemns Israel while leaving Hizballah's egregious actions unmentioned. It contains unsubstantiated factual allegations and conclusions of law that are not supported by fact or analysis.

It is important for the international community to speak with a unified voice. We urge the members of the Human Rights Council not to take any unbalanced or one-sided action that could undermine the Security Council's efforts to achieve a peaceful and durable solution in Lebanon.

On December 1, addressing the HRC on the report of the Commission on Inquiry on Lebanon established by the HRC at its special session, Ambassador Tichenor concluded:

> . . . No report can be credible that attempts to find facts and draw conclusions about an armed conflict without examining the actions of both sides. As a result, the report rewards Hizbollah's acts of deliberately attacking from populated areas and putting civilians in harm's way.
>
> Moreover, the Commission blurs the distinction between international humanitarian law, which is the law applicable to armed conflict, and human rights law.
>
> Recalling the suffering on both sides, and reiterating our dedication to helping Lebanon rebuild, we urge the Council to live up to its responsibility to consider all sides of a situation—and to act constructively, in accordance with its mandate, to promote and protect human rights so as to end the suffering on both sides.

See *www.usmission.ch/Press2006/1201TichenorLebanon.htm;* see also *www.usmission.ch/Press2006/1208Lebanon.html.*

(iii) Darfur

On December 12, 2006, the HRC convened its fourth special session, on the situation of human rights in Darfur. Ambassador Tichenor welcomed the special session in a statement set forth below. The statement is available at *www.usmission.ch/Press2006/1212Darfur.html*. The situation in Darfur is discussed further in G. below and in Chapter 17.A.4.

The United States is appalled by the violence in Darfur, Sudan and welcomes the Special Session on the situation in Darfur as we commend the Human Rights Council for drawing the world's attention to this ongoing crisis. It is important to make clear that the international community respects human life. The United States reiterates its strong concern for the dire humanitarian situation on the ground in Darfur, brought on by continued violence by all parties and exacerbated by continued lack of humanitarian access in some areas. The United States will continue to help relieve suffering and to save lives.

We call on the Government of Sudan, and all armed groups, including those rebel groups that have not signed the Darfur Peace Agreement (DPA), to refrain from violence and to pursue a peaceful solution to the crisis. We welcome the decision by the African Union and the United Nations to convene a conference of DPA non-signatories early in the New Year. There is pressing need to streamline initiatives to bring the non-signatories under one umbrella. We are encouraged by the involvement of AU Special Envoy Dr. Salim Salim, whose role in the Darfur Peace Agreement negotiations was so constructive.

Pending the restoration of peace and security, the Government of Sudan must shoulder its responsibility to protect all individuals against human rights violations, especially against the use of rape as a weapon against the women of Darfur and the recruitment of child soldiers. We stress our continued concern for the plight of the victims and repeat our call to end the impunity of their aggressors. We demand that the Government of Sudan cease employment of the janjaweed against the innocent civilians of Darfur.

The United States is also alarmed by the incipient spread of violence into neighboring Chad and Central African Republic (CAR). This escalation represents a disturbing new aspect to the violence in Darfur and poses a larger threat to the regional stability of Africa and the well-being of the citizens of these countries.

* * * *

c. Universal periodic review

As noted in Mr. Lagon's testimony *supra*, UNGA Resolution 60/251 establishing the Human Rights Council required the HRC, among other things, to undertake "a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States." U.N. Doc. A/RES/60/251, OP 5(e). On September 20, 2006, the United States submitted a proposal to establish a Peer Review Working Group ("PRWG") to carry out the reviews, composed of "the members of the Council, consisting of two members from each regional group in a structure like the Bureau of the HRC and CHR." The full text of the U.S. proposal is available at *www.usmission.ch/HRUpdates/0920ProposalPeerReview.htm*. *See also* U.S. statement on the terms of reference and basis for review available at *www.usmission.ch/Press2006/1204PeriodicReview.html*.

d. Mandate review, expert advice and complaint procedure

Operative paragraph 6 of UNGA Resolution 60/251 required the HRC to "assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure. . . ." On September 20, 2006, the United States submitted a non-paper addressing each of

these issues briefly. *See www.usmission.ch/HRUpdates/0920MandateReview.htm.*

On December 6, 2006, Jeffrey D. Kovar, Legal Adviser to the U.S. Mission to the United Nations in Geneva, addressed proposals for a new complaint procedure. The full text of Mr. Kovar's statement, excerpted below, is available at *www.us-mission.ch/Press2006/1206ComplaintProcedure.html. See also* U.S. statements on HRC working methods (available at *www.usmission.ch/Press2006/1130HRCLevin.html),* mandate review (available at *www.usmission.ch/ Press2006/1205MandateReview.html*), and expert advice (available at *www.usmission.ch/Press2006/1207ExpertAdvice.htm*).

---

* * * *

We have heard widespread agreement that the current [confidential communications]1503 procedure works in a satisfactory way to address gross and systematic violations that have not been resolved through domestic procedures. The U.S. view is that we must start with the presumption that the current system should not be changed unless a compelling need is established. The current complaints mechanism plays a vital role, and does so quite well.

Two basic admissibility criteria have existed since the procedure was created in 1970, and they must remain unchanged:

- that there be a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms";
- and that "domestic remedies must have been exhausted before a communication is considered—unless it can be shown convincingly that solutions at the national level would be ineffective or that they would extend over an unreasonable length of time."

While the Facilitator's preliminary conclusions preserve these critical elements, the outline buries the highly-important exhaustion requirement among more discretionary elements. This must be clarified in future drafts.

The U.S. has proposed that the Secretariat perform a more robust technical screening-out of inadmissible complaints together with a single working group of government experts to review the remaining cases. We hope this proposal will be favorably considered.

However, even if the Council would choose to maintain the current structure of two working groups, it is essential that the second-stage government expert working group be clearly empowered to reject complaints that do not meet the admissibility criteria. We do not agree with suggestions that the second working group could only look at possible measures.

Our experience with the current system (and we have heard this echoed by many other delegations) is that inadmissible complaints do find their way to the current Working Group on Situations, which dismisses them on that ground. That check must be maintained.

We will have many other technical issues to raise in future working group sessions led by the Facilitator. Let me here simply note two points.

First, we do not think that the complaint mechanism should be formally linked to the UPR mechanism. All serious human rights violations need not be routed through the UPR mechanism.

And second, we think calls for the complaint mechanism to be an "early warning system" miss the fundamental point that 1503 is a mechanism to deal with serious and systematic violations after domestic remedies have proved ineffective. By its nature it is intended to deal with stubborn and systemic problems, not newly emerging ones.

3. Cuba

On September 26, 2006, Ambassador Tichenor addressed the HRC on the Report of the Personal Representative of the High Commissioner for Human Rights on the Situation of Human Rights in Cuba. Ambassador Tichenor's statement, set forth below, is available at *www.usmission.ch/HRUpdates/0926TichenorHRCuba.htm.*

Cuba is one of the world's most repressive regimes. The government there constitutes a threat not only to the people of Cuba, but also to regional stability—particularly with respect to the consolidation of democracy and market economies in the Western Hemisphere.

* * * *

The United States agrees with Madame Chanet's recommendation that Cuba should halt the prosecution of its citizens who are exercising rights reflected in Articles 18, 19, 20, 21, and 22 of the Universal Declaration of Human Rights. The United States strongly supports her recommendation that Cuba should allow non-governmental organizations entry into the country. We also agree that Cuba should promote pluralism in trade unions, associations, political parties, and other entities throughout Cuba.

The United States disagrees with the comments on the embargo in the Report. The Cuban government's neglect of its own people is the reason for Cuba's economic and political woes. United States policy towards Cuba encourages a transition towards a democratic, market-oriented society. The embargo denies the Cuban government hard currency that it would use to continue to oppress the Cuban people and further prop up the regime.

* * * *

On November 8, 2006, Ambassador Ronald Godard, U.S. Senior Advisor, addressed the 50th Plenary Meeting of the General Assembly, objecting to a draft resolution on Cuba, as excerpted below. The full text of Ambassador Godard's statement is available at *www.un.int/usa/06_322.htm*.

The United States trade embargo is a bilateral issue and as such should not come before the General Assembly. We maintain this embargo to demonstrate our continuing call for economic and political freedom for all Cubans. We maintain the embargo so that the benefits of U.S. food and medical sales go to the Cuban people, not to privileged leaders.

Cuba has introduced this resolution claiming that the embargo adversely affects the Cuban people, cynically asking everyone to ignore the truth: that the Cuban government's policy of systematically

denying the human, economic, labor, and political rights of its people over 47 years is the real source of the "adverse affects on the Cuban people." Yet the Cuban government asks that you vote to blame the United States for its failures.

The resolution inaccurately blames the U.S. trade embargo for the hardships of the Cuban people, while exonerating the Cuban government's own policies, which deny the right of the Cuban people to a fair wage, to own and operate a business, to buy and sell property, to freely associate, and to freely express their opinions. The UN Economic Commission on Latin America (ECLAC) concluded that Cuba must promote small business opportunities to bring life to the Cuban economy. But the Cuban government has refused to accept the need for the kind of free market reforms that would bring opportunities to the Cuban people.

This resolution also inaccurately claims that the U.S. embargo is a violation of freedom of navigation. In fact, the U.S. embargo does not prevent the rest of the world from trading with Cuba or providing Cuba access to food or medicine. In fact, since 1992, the United States has licensed over $1.5 billion dollars in the sale and donation of medicine and medical equipment for the Cuban people, and over $8 billion worth of agricultural commodities in the past 5 years. In November of 2005, the head of Cuba's food importing agency confirmed that the U.S. was Cuba's biggest food supplier.

If the Cuban government wants the U.S. to end this embargo, it knows what is needed—reforms that will benefit the Cuban people, such as free and fair elections, an open economy, independent trade unions, and a free press, to name a few. In 2002, President Bush made clear that his response to such concrete reforms would be an effort with the U.S. Congress to ease restrictions on trade and travel between the United States and Cuba. However, four years have passed and the Cuban government answered the challenge for freedom only with imprisonment for human rights leaders and trade unionists.

* * * *

We will vote against this resolution, and we encourage all delegations that support the rights of and a transition to freedom for the Cuban people to do the same. We should send a clear message

to the Cuban government that it is not the embargo, but rather its own denial of the basic human rights of its people, that is the cause of their suffering.

4. U.S. Implementation of the International Covenant on Civil and Political Rights before the UN Committee on Human Rights

a. Committee consideration

On July 17-18, 2006, the United States met with members of the UN Committee on Human Rights, the international body charged with reviewing implementation of the International Covenant on Civil and Political Rights ("ICCPR"). The session provided a venue for questions and answers concerning U.S. implementation of the ICCPR following submission of the combined Second and Third Periodic Report of the United States of America to the Committee on Human Rights on October 21, 2005. The report is available at *www.state.gov/g/drl/rls/55504.htm*. *See Digest 2005* at 258-300. *See also* Chapter 4.B.2.a. for a July 18 statement on U.S. treaty practice as relevant to its implementation of the ICCPR.

On July 17, 2006, Matthew Waxman, Principal Deputy Director of Policy Planning, U.S. Department of State and Head of U.S. Delegation, delivered an opening statement. Mr. Waxman explained, among other things, that "in light of our principled and longstanding view on the scope and application of U.S. obligations under the Covenant, the United States has not included in its formal response to the Committee's written questions information regarding activities outside of its territory or governed by the law of armed conflict." As a courtesy, the U.S. delegation included information provided in May to the Committee Against Torture on those issues; *see* F.2. below and Chapter 18.A.4.b(2). The full text of the statement, excerpted below, is available at *www.usmission.ch/0717Waxman.html*.

* * * *

The seriousness with which we have approached our reporting obligations reflects our view that the Covenant is the most important human rights instrument adopted since the U.N. Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections. The United States played a significant role in drafting those foundational instruments.

The United States is equally proud to have actively participated in the process to transform the human rights and fundamental freedoms referred to in those founding instruments into the legally binding treaty obligations elaborated in the Covenant. This is particularly true in light of the parallels between the rights and freedoms protected under the U.S. Constitution, including its Bill of Rights and subsequent amendments, and the human rights and fundamental freedoms protected under the Covenant. Many of the most cherished rights protected by the U.S. Constitution, such as freedom of religion, speech, press, and assembly, the right to trial by jury, the prohibition on unreasonable searches and seizures, and the prohibition on cruel and unusual punishments, also find expression and protection in the Covenant.

* * * *

In appearing before the Committee this week, my delegation is well aware of the intense international interest about a wide range of issues relating to the actions of the United States outside of its territory.

As we have explained before, the United States believes that the law of armed conflict—international humanitarian law—provides the proper legal framework regarding some of the questions raised by the Committee.

* * * *

In addition, it is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party. We are aware of the views of members of this Committee regarding the extraterritorial application of the Covenant, including the Committee's General Comment No. 31. While we have great respect for the Committee's views, as the Committee is aware, the United States has a principled and long-held

view that the Covenant applies only to a State Party's territory. It is the long-standing view of my government that applying the basic rules for the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2, Pargraph 1, establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH within the territory of a State Party and subject to its jurisdiction. First, this interpretation is confirmed by the ordinary meaning of the treaty text. Article 2, Paragraph 1, of the Covenant states explicitly that State Parties are required to respect and ensure the rights in the Covenant to all individuals, and I quote, "within its territory and subject to its jurisdiction."

Additionally, this plain meaning of the treaty language is also confirmed by the Covenant's negotiating record. The negotiating record of the Covenant makes clear that the inclusion of the reference to "within its territory" in Article 2(1) was adopted as a result of a proposal made over fifty years ago by U.S. delegate Eleanor Roosevelt—specifically to ensure that States Parties would not be obligated to implement the Covenant outside their territories. Mrs. Roosevelt emphasized that the United States was "particularly anxious" that it not assume "an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation" or in what she characterized as "leased territory" outside the territorial boundaries of a State Party. She further explained: "An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States." Several delegations spoke out against the proposed U.S. amendment at the time, arguing that a nation should guarantee fundamental rights to its citizens outside of its territorial boundaries as well as within them. They suggested that the "and" in the U.S. amendment should be replaced with the word "or." However, the U.S. amendment to change the text to the current formulation of Article 2 was adopted at the 1950 session by a vote of 8 in favor and 2 opposed, with 5 abstentions. Subsequent efforts to delete the phrase "within its territory" were also defeated. Accordingly, as State Department Legal Adviser Conrad Harper explained to this Committee in 1995, the words

06-Cummins-Chap06.indd 348 10/22/07 11:40:17 PM

"within its territory" had been debated and were added by vote. The clear understanding emerged that such wording limited the State Party's obligations to within its territory. Thus the territorial limitation in Article 2, far from being inconsistent with the object and purpose of the treaty, reflects the clear and expressed intention of those countries that negotiated the instrument.

Accordingly, to those who suggest that the U.S. interpretation regarding the scope of the treaty is new or novel, I must say that this is simply not fair or correct. This has been the U.S. position for more than 55 years.

Although we explained the U.S. interpretation of the territorial scope of the Covenant in great detail in Annex 1 of the report, I have reiterated and expanded upon it here for two reasons. First, because the United States is committed to upholding its Covenant obligations, it is important that the United States state when those obligations apply. Let me be clear: while the U.S. obligations under the Covenant do not apply outside of U.S. territory, it is important to recall that there is a body of both domestic and international law that protects individuals outside U.S. territory. Furthermore, as a matter of domestic U.S. constitutional law, U.S. citizens enjoy a wide range of constitutional protections outside of U.S. territory.

Second, clarifying our position on the scope of the Covenant, we hope, is useful in explaining our responses to this Committee's questions relating to military operations outside the territory of the United States. In keeping with the approach we took in drafting the U.S. report, and in light of our principled and longstanding view on the scope and application of U.S. obligations under the Covenant, the United States has not included in its formal response to the Committee's written questions information regarding activities outside of its territory or governed by the law of armed conflict.

As a courtesy, we provided this Committee with information we provided this May to the Committee Against Torture on these issues. While preserving the legal position of the United States, we seek to be responsive to the Committee's questions. We hope that the Committee will respect our efforts to focus this hearing on the issues falling squarely within the scope of the Covenant.

* * * *

In returning to matters involving our implementation of the Covenant within the United States, we hope that our Initial Report and our Second and Third Periodic Report have explained in detail the way in which the United States robustly implements its obligations under the Covenant. We cherish our vigorous democratic processes—which benefit from comprehensive freedoms of speech, assembly and the press—our strong and independent judicial system, and our well established body of constitutional, statut[ory] and common law designed to protect civil and political rights. Perhaps to a greater extent than in any other country, people in the United States share a culture and history of challenging their government through judicial processes. It is, thus, not a coincidence that many of the authorities referred to in our report stem from litigation and from decisions of the United States Supreme Court and other courts. Indeed, in many cases, the protections afforded by the U.S. Constitution extend *beyond* the protections afforded by the Covenant. For example, as the United States noted in its Initial Report to the Committee in 1994, "Under the First Amendment, opinions and speech are protected, categorically, without regard to content. Thus, the right to engage in propaganda of war is as protected as the right to advocate pacifism, and the advocacy of hatred as protected as the advocacy of fellowship." Similarly, people in the United States enjoy freedom to exercise their religion that extends beyond the requirements of the Article 18 of the Covenant. In his opening remarks, Assistant Attorney General Wan Kim will briefly address the active measures taken by the Department of Justice to zealously protect constitutional rights within the United States and ensure equal protection for all.

* * * *

b. U.S. written responses to committee questions

Prior to the oral session, the United States submitted written responses to questions posed by Human Rights Committee. The full text of the questions and answers, released July 17, 2006, is available at *www.usmission.ch/*

Press2006/ICCPRAdvanceQ&A.pdf. Selected excerpts follow. As noted in Mr. Waxman's opening statement, for questions concerning matters covered by the law of war, the U.S. responses provided information from its recent session with the Committee on Torture. *See* F.2. below and Chapter 18.A.4.

In response to a question (Q1) on U.S. relationship with Indian tribes, the United States referred the committee to its lengthy response in the 1994 U.S. Initial Report and the 1995 discussions before the HRC. It then continued as excerpted below, noting, however, that "the fact that the United States discussed the domestic concept of tribal self-determination under Article 1 of our [initial] report does not reflect a legal conclusion that tribes possess a right to self-determination under international law."

---

* * * *

The United States, when breaking away from England, inherited the rights England had with respect to lands in what is now the United States. They included the exclusive right of purchase of lands held or occupied by Indian tribes. They did not deny to the tribes the rights to their lands but only limited to whom those lands could be sold or transferred. In fact, the states of the Union could not enter into treaties with tribes to acquire their lands.

The majority of the land that is now the United States was not acquired by conquest or "discovery" by the United States. The Louisiana Purchase from the French (1803), the Gadsden Purchase from Mexico (1853), cession from Mexico of what is now California, Nevada, Utah, New Mexico and Arizona, the Oregon compromise with Britain, and the purchase of Alaska from Russia all comprise the majority of U.S. territory. In each of those cases the Indian tribes retained the rights to their lands, and the United States, in some 67 other transactions with the tribes, by treaty, acquired actual title from the Indians.

During its first hundred years of existence, the United States engaged with Indian tribes through federal legislation and the treaty making process. Treaty making between the federal government and the Indian tribes ended in 1871, but the treaties retain their

full force and effect even today as they are considered the equivalent of treaties with foreign governments and have the force of federal law. Unlike treaties with foreign governments, treaties with Indian tribes are subject to special canons of construction that tend to favor Indian interests. Treaties with Indian tribes are interpreted, to the extent that such original intention is relevant, as they would have been understood by the Indians at the time of their signing, not by the American authors of the treaties; and where the treaty is ambiguous as to its interpretation, the Court will interpret it to favor the Indians specifically because it was not written by them or in their language.

Further, the United States voluntarily has extended exceptional protections to Indian tribes by statute. The United States specifically provided in 1946 for the Court of Claims to allow tribes to bring actions against the United States where the tribes believe any of their treaty rights had been violated. The Indian Claims Commission Act (P.L. No. 79726) also provided that the defenses of laches and the statute of limitations were not available to the United States in such cases. Previously, between 1836 and 1946, the Congress had by special bills waived the immunity of the United States from suit and provided for Indian tribes to sue in the Court of Claims on 142 occasions. Violations accruing before 1946 were to be brought before the Claims Commission and claims accruing after 1946 could be brought directly in the Court of Claims. In this regard, again, tribes enjoy extraordinary protections not available to foreign states with which the United States may enter into a treaty.

Under the Constitution, the U.S. Congress, [to] the exclusion of state governments, is given the authority to regulate Indian affairs. This exclusive placement of authority with the federal government has been consistently described by the United States Supreme Court as "plenary power."

This power is subject to the limitations placed on Congressional actions by the Constitution, including the Fifth Amendment prohibitions on depriving individuals of life, liberty, or property, without due process of law, "or on the taking of private property for public use without the payment of just compensation." Congressional action, through use of its plenary power, is also subject to judicial review.

With respect to Article 1 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant"), Indians are of course citizens of the United States with the same constitutional protections as all other citizens and the same rights to participate in public affairs and in the US democratic process. As stated during the hearing for the US initial report in 1995, the fact that the United States discussed the domestic concept of tribal self-determination under Article 1 of our report does not reflect a legal conclusion that tribes possess a right to self-determination under international law.[1] The concept of sovereignty of tribes is not the same concept as that of sovereignty of nation states under international law. With respect to Covenant Article 27, US law and practice, as described below, goes far beyond what is required by Article 27.[2]

Under federal Indian law, tribal self-determination means that tribes have a government-to-government relationship with the US government and have the right to operate their own governmental systems within the US political system. Such powers of self-government with respect to local affairs go beyond culture, religion, and language and extend to such areas as education, information, social welfare, family relations, economic activities, lands and resource management, environment, and entry into tribal lands by nonmembers as well as ways and means for financing these autonomous functions.

In addition, U.S. law specifically provides numerous protections for the continued use and practice of Native American languages and religions. The United States has enacted specific statutes to help preserve Indian languages and provides for the right, under certain circumstances, to vote and receive election information in the tribe's languages in federal and state elections. There are specific provisions within some federal criminal statutes that limit their

[1] See the explanation of U.S. delegation to the Committee in 1995 that "the concept of sovereignty as applied to tribes was not the same concept as the sovereignty of States under international law." Human Rights Committee Summary Record of the 1405th meeting (March 31, 1995), CCPR/C/SR.1405, paragraph 67.

[2] See, e.g., views of the Human Rights Committee in General Comment 23, paragraph 3.2.

06-Cummins-Chap06.indd 353 10/22/07 11:40:17 PM

application in order to protect and preserve Native religious practices, including for example, the sale, possession and use of Peyote and the possession and transfer of Eagle feathers and eagle parts.

The United States responded to a question (Q2) concerning "obstacles to the withdrawal of reservations, in particular to articles 6(5) and 7 of the Covenant," as follows.

The U.S. reservation to Article 6(5) states:

> (2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

This reservation remains in effect, and the United States has no current intention of withdrawing it. We note, as a courtesy to the Committee, that U.S. judicial decisions, independent of any obligation of the United States under the Covenant, recently have tightened restrictions on the death penalty in the United States. In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court held that imposition of capital punishment on those who were under 18 years of age at the time of the offense violates the U.S. Constitution's Eighth Amendment protection against cruel and unusual punishment. *Id.* at 578. Although the decision in the *Roper* case does not change the formal scope of the U.S. treaty reservation to Article 6(5), the effect of the decision is that the United States, as a matter of its own constitutional law, will not execute persons who were below the age of 18 years at the time of the offense. Thus, while the last sentence in the above-referenced reservation preserves the discretion of the United States under the Covenant to impose the death penalty "for crimes committed by persons below eighteen years of age," the fact is that the United States does not do so.

The U.S. reservation to Article 7 states:

> (3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

The United States entered this reservation because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" ("CIDTP"), and this reservation was undertaken to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 7. The reasons underlying the decision by the United States to file its reservation to Article 7 have not changed, as the underlying vagueness of this provision remains. Because of the concern that certain practices that are constitutional in the United States might be considered impermissible under possible interpretations of the vaguely-worded standard in Article 7, the United States does not currently intend to withdraw that reservation.

The U.S. responded to a question (Q3) concerning the compatibility with the Covenant of the definition of terrorism under national law as excerpted below.

The Covenant does not address the question of how a State Party might define the term "terrorism" under its domestic law. Within the United States, there is no uniform definition of terrorism under [U.S.] national law. Some federal statutes use the term "terrorism" and define that term in a manner consistent with the specific purpose of those particular statutes. Such statutes arise in many different subject areas including, among other things, with respect to law enforcement, economic sanctions, immigration, and executive branch reporting requirements. This response will focus on one particular type of legal mechanism—established by statute and executive order—under which a person or organization is

"designated" as a terrorist and that designation has a series of financial consequences. This authority is crucial to the counterterrorism efforts of the United States Government.

* * * *

The definitions of "terrorism" and "terrorist activity" referred to above [8 U.S.C. § 1182(a)(3)(B), 22 U.S.C. § 2656f, and Executive Order 13224] are set forth in Annex A. As is clear upon inspection, these definitions simply establish the ways in which terrorist activity is distinguishable from other forms of violent and dangerous activity, and contain nothing that is on their face incompatible with U.S. obligations under the Covenant. Moreover, the designation authorities of which these definitions form an integral part are themselves subject to appropriate procedural safeguards, and are compatible with U.S. obligations under the Covenant. . . . The U.S. government accordingly considers that the above-referenced definitions are compatible with U.S. obligations under the Covenant.

In response to a question (Q10) concerning whether the United States has "adopted a policy to send, or to assist in the sending of suspected terrorists to third countries, either from U.S. or other States' territories for purposes of detention and interrogation," the United States provided the following comments on the lack of a non-refoulement obligation under the Covenant.

As an initial matter, the United States would like to emphasize that, unlike the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment ("Convention Against Torture"), the Covenant does not impose a nonrefoulement obligation upon States Parties.

We are familiar with the Committee's statement in General Comment 20 regarding Article 7 of the Covenant that:

"States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or

> punishment upon return to another country by way of their extradition, expulsion or refoulement." [4]

However, the United States disagrees that States Parties have accepted that obligation under the Covenant.

Unlike the Convention Against Torture, the Covenant does not contain a provision on non-refoulement. Indeed, the adoption of such a provision was one of the important innovations of the later-negotiated Convention Against Torture. States Parties to the Covenant that wished to assume a new treaty obligation with respect to non-refoulement for torture were free to become States Parties to the Convention Against Torture, and a very large number of countries, including the United States, chose to do so. Accordingly, States Parties to the Convention Against Torture have a non-refoulement obligation under Article 3 of that Convention not to

> "expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

In becoming a State Party to the Convention Against Torture, the United States carefully reviewed the language in Article 3 of that instrument and adopted formal understandings to clarify the obligations that the United States accepted under Article 3. The totality of U.S. treaty obligations with respect to non-refoulement for torture are contained in the obligations the United States assumed under the Convention Against Torture.

The Committee's language in its General Comment 20 not only poses a new obligation not contained in the plain language of Article 7 of the Covenant, but it also poses an obligation beyond the non-refoulement protection contained in Article 3 of the Convention Against Torture.

---

[4] The Human Rights Committee further expanded on this approach in Paragraph 12 of its General Comment 31. (CCPR/C/21/Rev.1/Add., adopted on March 13, 2004) The arguments of the United States with respect to General Comment 20 apply, mutatis mutandis, with respect to the non-refoulement arguments contained in General Comment 31.

06-Cummins-Chap06.indd 357 10/22/07 11:40:18 PM

Specifically, it would change the standard regarding the degree of risk the individual must face and [would] extend[] the protection to persons who face cruel, inhuman or degrading treatment or punishment. In contrast, under the Convention Against Torture, the protection against refoulement applies only to torture and not to cruel, inhuman or degrading treatment or punishment that do not amount to torture.

Although it disagrees that Covenant Article 7 contains a prohibition on non-refoulement, as a matter of courtesy, the United States provides the following information in response to the Committee's questions.

As the United States recently explained to the Committee Against Torture, pursuant to its obligations under the Convention Against Torture, the United States does not expel, return ("refouler") or extradite a person from the territory of the United States to another country where it is more likely than not that such person will be tortured.

For persons in U.S. custody outside of the territory of the United States, as a matter of policy, the United States follows a similar standard and does not transfer or return persons to countries where it determines that it is more likely than not that the person will be tortured.

This policy applies to all components of the U.S. Government and to individuals in U.S. custody, regardless of where they may be detained. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

As has been stated publicly, the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary of State Condoleezza Rice recently explained that the United States and other countries have long used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.

The United States considers rendition a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. However, as is true with the case of immigration

removals and extraditions, in conducting renditions, the United States acts in accordance with its obligations under the CAT and, even in instances in which the CAT does not apply, does not transport individuals to a country when it believes that the individuals would more likely than not be tortured in that country.

There are no exceptions to this policy, including for terrorists, though different procedures apply depending on the circumstances, including location of the individual, whether the individual is in immigration removal or extradition proceedings, and the nature of such proceedings. For more detailed information on such procedures, including the Committee's question regarding the suspensive effect of "non-refoulement" protections, the United States refers the Committee to its written answers to questions from the Committee Against Torture, submitted prior to its hearing before the Committee in May 2006.

Regarding diplomatic assurances, the United States would like to emphasize, as it did in paragraph 33 of the Second Periodic Report of the United States to the Committee Against Torture, that diplomatic assurances are used sparingly, but that assurances may be sought in order to be satisfied that it is not "more likely than not" that the individual in question will be tortured upon return. It is important to note that diplomatic assurances are only a tool that may be used in appropriate cases and are not used as a substitute for a case-specific assessment as to whether the standard established by the United States obligations under Article 3 of the Convention Against Torture is met. If, taking into account all relevant information, including any assurances received, the United States believed that the standard is not met, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of diplomatic assurances, but declined to return individuals because the United States was not satisfied such an assurance would satisfy its obligations under Article 3 of the Convention Against Torture.

Finally, with respect to the removal of Mr. Arar from the United States, the United States notes, as it did before the Committee Against Torture, that the removal of Mr. Arar from the United States was done pursuant to U.S. immigration law and after a

determination was made that his removal would be consistent with Article 3 of the Convention Against Torture.

In response to a question (Q11) which asked, among other things, "how far closing of the immigration court hearings to the public is compatible with the Covenant," the United States stated as follows.

* * * *

. . . [T]he closure of administrative immigration hearings, in whole or in part, is fully consistent with Articles 9, 10, and 14 of the Covenant. The Covenant does not require immigration removal proceedings to be open to the public. On this point, the Covenant could not be clearer. Article 14 of the Covenant requires a "public hearing . . . in the determination of any criminal charge." But an immigration charge does not involve the resolution of any criminal charge; it is well established that removal of an alien is not a criminal sanction. In any event, we provide the following information as a courtesy to the Committee.

The immigration regulations have long authorized full or partial closure of immigration hearings to protect "witnesses, parties, or the public interest." 8 C.F.R. § 1003.27(b). In recent years, immigration judges have also had authority to issue protective orders upon a showing by the government of a "substantial likelihood" that specific information submitted under seal will, if disclosed, harm the national security or law enforcement interests of the United States. 8 C.F.R. § 1003.46(a). Upon issuance of a protective order, the alien is provided the sealed information. 8 C.F.R. § 1003.46(f)(3). Although these proceedings may on occasion be closed to the public, they do not limit the substantial procedural protections afforded aliens in such proceedings.

For example, aliens in administrative removal proceedings, before an immigration judge pursuant 8 U.S.C. § 1229a regardless of whether they are deemed a national security risk, are given notice of the charges of removability against them. They have an opportunity to be heard and to present evidence, with the assistance of counsel and, if necessary, a certified interpreter. Moreover,

06-Cummins-Chap06.indd 360 10/22/07 11:40:18 PM

while the Attorney General found it necessary to close a discrete category of removal cases to the public in the immediate aftermath of the September 11th terrorist attacks, even in those cases, the aliens and their counsel were free to disclose to the public any information about their removal proceedings that was not specifically subject to a protective order. These procedural protections are consonant with Articles 9, 10, and 14, which safeguard against arbitrary arrest and detention, require detained persons to be treated "with humanity," and ensure "a fair impartial tribunal established by the law."

. . . These procedural protections are consonant with Articles 9 and 10, which safeguard against arbitrary arrest and detention, require detained persons to be treated "with humanity," and ensure "a fair and public hearing by a competent, independent and impartial tribunal established by the law." These procedures are also fully consistent with Article 13, which provides that "[a]n alien lawfully in the territory of a State Party . . . may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority."

In response to a question (Q12) concerning whether certain sections of the PATRIOT Act of 2001 (Pub. L. 107- 56, 115 Stat. 272) comply with the Covenant, the United States responded as provided below. The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, referenced in the answer, was signed into law on March 9, 2006.

Section 213 of the USA Patriot Act codified existing U.S. common law regarding delayed-notice search warrants, which have been available for decades and were in use long before the USA PATRIOT Act was enacted. In this way, section 213 was not a significant grant of new authority to law enforcement officials; rather, it simply created a nationally uniform process and standard for obtaining

such search warrants. The judiciary continues to play an integral role in the use of such warrants. As with all criminal search warrants, a delayed-notice search warrant is issued by a federal judge only upon a showing that there is probable cause to believe that the property sought or seized constitutes evidence of a criminal offense.

The USA PATRIOT Improvement and Reauthorization Act of 2005 added new protection for subjects of the warrant. Section 213 of the initial Act had required that notice be given within a "reasonable" period of time, as determined by the judge. Section 114 of the reauthorization legislation provides a presumption that notice must be given within 30 days after the warrant is executed, with extensions limited to periods of 90 days or less. Congress also imposed a reporting requirement designed to provide information on how often delayed-notice search warrants are used and the periods of delay authorized. In fact, delayed-notice warrants are rare; according to an informal estimate in early 2005, they were used in less than 0.2 percent of all federal warrants authorized since the enactment of the USA PATRIOT Act.

Section 215 of the USA PATRIOT Act authorized federal prosecutors to issue subpoenas for records about an individual that are held by third parties. The Act extended to investigators in international terrorism and espionage investigations an authority comparable to a grand jury subpoena, with the exception that section 215 orders require prior judicial approval. The USA PATRIOT Improvement and Reauthorization Act of 2005 explicitly provides that recipients of a section 215 order may consult an attorney and challenge it in court. The legislation also provided additional protections for information that is viewed as more sensitive, such as tax, education, and library records. Finally, the legislation provided for public reporting of the number of section 215 orders issued on an annual basis. During calendar year 2005, the court approved only 155 applications for access to certain business records.

National Security Letters (NSLs) predate the USA PATRIOT Act but procedures for their use were amended by section 505 of that Act. An NSL allows national security investigators to request certain types of information from specified entities, such as subscriber records from communications providers. NSLs do not

06-Cummins-Chap06.indd 362 10/22/07 11:40:19 PM

authorize searches and are not self-enforcing; therefore, if a recipient does not comply, investigators must go to court to secure compliance. Recent legislation clarifies that recipients of NSLs may consult an attorney and challenge an NSL in court and that nondisclosure orders no longer automatically accompany an NSL and may be challenged in court. Again, these provisions ensure judicial oversight. During calendar year 2005, the Department of Justice made NSL requests for information concerning approximately 3,500 U.S. persons, using approximately 9,250 requests. Section 412 of the USA PATRIOT Act allows the government, with extensive judicial supervision, to detain temporarily a narrow class of aliens until they are removed from the country. Under section 412, there must be "reasonable grounds to believe" that the alien: (1) entered the United States to violate espionage or sabotage laws; (2) entered to oppose the government by force; (3) engaged in terrorist activity; or (4) endangers the United States' national security. Section 412 expressly grants aliens the right to challenge their detention in court. Specifically, aliens may file a habeas petition in any federal district court that has jurisdiction, thus guaranteeing that a detained alien will have access to judicial review to examine the lawfulness of his or her detention. This provision is the equivalent of denying bail to a criminal defendant. Once the Government has taken such an alien into custody, it has seven days to initiate removal proceedings or file criminal charges. If the Government does neither, it must release the alien. The United States has never used this authority to detain an alien.

These provisions are clearly compatible with U.S. obligations under the Covenant.

> The United States responded as set forth below to a question (Q13) concerning reports of phone, email, and fax monitoring "of individuals both within and outside the U.S., without any judicial oversight."

Article 17 of the Covenant provides, in relevant part, that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks

on his honour and reputation." For reasons described in this response, the Terrorist Surveillance Program is consistent with this article.

Pursuant to the Terrorist Surveillance Program described by the President in December 2005, the National Security Agency targets for interception of communications where one party to the communication is outside of the United States and where there are reasonable grounds to believe that either party is a member of al Qaeda or an affiliated terrorist organization. The "reasonable grounds to believe" standard is a "probable cause" standard of proof of the type incorporated into the Fourth Amendment. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("We have stated . . . that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'"). Thus, this program does not involve an arbitrary intrusion into personal privacy. Due to the speed and agility required to prevent a subsequent terrorist attack within the United States, judgments about whether individual communications meet these criteria are made by experienced intelligence officers rather than courts.

The Terrorist Surveillance Program fully complies with Article 17 of the Covenant. Under the Terrorist Surveillance Program, experienced intelligence officers carefully ensure that each communication involves a member of a terrorist organization or its affiliates that has executed or is planning terrorist attacks on the United States. In addition, the President reviews the need for and safeguards underlying this program every forty-five days. These standards and procedures prevent the "arbitrary or unlawful interference with . . . privacy" prohibited by Article 17.

In any event and as explained in its Third Periodic Report, the United States implements its obligations under Article 17 of the Covenant through the Fourth Amendment to the United States Constitution, and the Terrorist Surveillance Program satisfies the Fourth Amendment. The Fourth Amendment bars unreasonable searches, but does not require a court order or warrant in all instances. Indeed, the Supreme Court has recognized that searches without a warrant are permissible for "special needs, beyond the normal need" for traditional criminal law enforcement. *See, e.g., Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). The Terrorist Surveillance Program serves such a special need: protecting the

06-Cummins-Chap06.indd 364 10/22/07 11:40:19 PM

nation from foreign attack by detecting and preventing plots by a declared enemy of the United States. Thus, the absence of judicial orders in the Terrorist Surveillance Program does not violate the Fourth Amendment and, given the significant interest at stake, constitutes neither an unreasonable search nor an "arbitrary or unlawful interference with . . . privacy."

In response to a question (Q17) concerning application of the death penalty, the United States noted first that it "took a reservation to the Covenant, permitting it to impose capital punishment within its own constitutional limits." *See* response to Question 3 *supra*. "Accordingly, the scope of the conduct subject to the death penalty in the United States is not a matter relevant to the obligations of the United States under the Covenant." The United States answered the question, however, as provided below.

* * * *

. . . U.S. constitutional restraints, federal and state laws, and governmental practices have limited the death penalty to the most serious offenses and ha[ve] prevented the racially discriminatory imposition of the death penalty. Federal laws providing for the death penalty involve serious crimes which result in death, such as murder committed during a drug-related shooting, civil rights offenses resulting in murder, murder related to sexual exploitation of children, murder related to a carjacking or kidnapping, and murder related to rape.

There are also a few very serious non-homicide crimes that may result in a death sentence, *e.g.*, espionage, treason, and possessing very large quantities of drugs or drug receipts as part of a continuing criminal enterprise. Recently, Congress enacted several carefully circumscribed capital offenses intended to combat the threat of terrorist attacks resulting in widespread loss of life. (*See* 18 U.S.C. §§ 1991, 1992, 1993, 2282A, 2283, 2291). These exceptionally grave criminal acts all have catastrophic effects on society.The federal government maintains a system for carefully examining each potential federal death penalty case, without consideration of the

defendant's race, to ensure that the federal death penalty is sought in a fair, uniform, and nondiscriminatory manner nationwide. Federal law specifically prohibits relying on a defendant's race or national origin in deciding to seek or impose the death penalty, and the federal death penalty statute additionally requires a sentencing authority to certify that the defendant's race was not considered in deciding the defendant's sentence.

State governments retain primary responsibility for establishing procedures and policies that govern state capital prosecutions. Recently, however, the United States Supreme Court excluded from application of the death penalty those offenders who, at the time of the offense, were under age 18, *Roper v. Simmons*, 543 U.S. 551, 578 (2005), or mentally retarded, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Those decisions are binding on the States. Congress also enacted in 2004 legislation permitting DNA testing in relevant federal and state cases, *see* 18 U.S.C. § 3600. Earlier this year, Congress also enacted legislation providing for the adoption of procedures to ensure appointment of highly qualified counsel for indigent capital defendants in state cases, *see* 18 U.S.C. § 3599. Many states have likewise adopted procedures of their own to provide experienced and highly competent counsel for indigent defendants.

In response to a question (Q 24) concerning reports of state laws allowing children to receive life without parole sentences and the treatment of such children in prison, the United States responded as set forth below.

The sentencing and treatment of juveniles in custody in the United States fully complies with the obligations of the United States under the Covenant, including the "right to such measures of protection by his status as a minor".

It is true that persons under the age of 18 in the United States may be sentenced to life in prison without the possibility of parole. In imposing these sentences on persons under 18, governmental entities in the United States have "take[n into] account their age and the desirability of promoting their rehabilitation," consistent

with Article 14(4) of the Convention. As a general matter, however, the lengthy sentences were imposed on persons who, despite their youth, were hardened criminals who had committed gravely serious crimes. Although these sentences may be of a type more often imposed on adults, the United States deposited a reservation with its instrument of ratification stating that it may, consistent with the obligations it assumed under the Covenant, treat certain juveniles as adults under exceptional circumstances.[6] In any event, the imposition of such sentences is accompanied by extraordinary safeguards. If a person under the age of 18 has been sentenced to life in prison without parole, or has had his or her freedom otherwise severely restricted, that juvenile will already have been tried and convicted of an extremely serious crime as an adult (e.g., murder or rape) and would be determined through formally constituted judicial proceedings to be an extreme danger to society. Each state within the United States handles the prosecution, rehabilitation, treatment, and imprisonment of juvenile offenders pursuant to its own statutes. Whether a juvenile offender is prosecuted as an adult depends upon a number of factors that are weighed by a court, such as, inter alia, the age or background of the juvenile, the type and seriousness of the alleged offense, the juvenile's role in committing the crime, and the juvenile's prior record/past treatment records. This ensures that the juvenile is no longer amenable to the treatment and rehabilitative nature of the juvenile justice systems found in most states in our country. Sentencing patterns at the state level vary, but generally, once a juvenile who has been tried as an adult has been found guilty of a serious crime which is punishable by life in prison without parole, a sentencing court may impose a term of imprisonment similar to other adult defendants. Juvenile offenders are separated from adult prisoners to the extent possible, taking into account factors such as the security risk that they pose to other prisoners, the risk of harm to themselves, their need for medical and/or mental health treatment options, and the danger they pose to others and to the community.

---

[6] The U.S. reservation states, inter alia, that "[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14."

At the federal level, the United States Government recognizes that juveniles are a special population with special needs. Juveniles committing delinquent acts, or other criminal acts not subject to federal jurisdiction, are usually returned to their respective states for handling according to their laws. Federal courts do not become involved in a juvenile's case unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that it is necessary to invoke federal jurisdiction over that particular case.

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with incarcerated adults who have been convicted of a crime or are awaiting trial on criminal charges. For less serious crimes, juveniles are usually committed to foster homes or community-based facilities located in or near the juvenile's home community. Every juvenile who has been committed must be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment. . . .

* * * *

The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 authorizes the U.S. Department of Justice Civil Rights Division (CRD) to enforce the constitutional rights of juveniles confined to state prisons. In these juvenile justice matters, CRD has increased the number of settlement agreements, doubled the number of investigations authorized, and tripled the number of findings letters issued over the past five years. Federal CRIPA investigations focus on myriad issues, including the inappropriate use of isolation. The CRD has determined that the inappropriate isolation of juveniles, including long-term isolation as punishment for disruptive or disturbed behavior violates constitutional rights. The CRD has made findings that isolation should be used only to the extent necessary to protect juveniles from harm to themselves or others or to maintain institutional discipline. Moreover, the CRD has found that youth placed in disciplinary isolation are entitled to notice of their charges, a hearing before an independent

06-Cummins-Chap06.indd 368 10/22/07 11:40:19 PM

decision-maker, and an opportunity to present evidence in their defense.

> The Committee on Human Rights concluded its review of the U.S. report on July 28, 2006. In a press release of that date, available at *www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/9501CD6BBE081310C12571B900367CAA?OpenDocument*, the committee stated:
>
> > Following its consideration of the combined second and third periodic reports of the United States, the Committee welcomed the Supreme Court's decision in Hamdan v. Rumsfeld (2006) establishing the applicability of common article 3 of the Geneva Conventions of 12 August 1949 in any armed conflict. The Committee was concerned by credible and uncontested information that the State party engaged in the practice of detaining people secretly for months and years on end. With regards to the Patriot Act, the Committee was concerned that the State Party still monitored phone, e-mail, and fax communications of individuals within and outside the United States, and requested the State Party to ensure that interference in privacy was conducted only where strictly necessary, under protection of the law, and that appropriate remedies were made available.
>
> A press release of the same day issued by the U.S. Mission to the United Nations in Geneva on behalf of the U.S. delegation to the UN Human Rights committee, described the U.S. reaction as follows. The full text of the U.S. press release is available at *www.us-mission.ch/Press2006/0728ICCPR.html*.

We have just received the Report of the Human Rights Committee on the Second and Third Periodic Reports of the United States, and we need to review it further before we can offer more detailed comments.

This report process is required of all States Parties to the treaty. The Covenant sets out a comprehensive body of core human rights protections that are cherished by all people in all countries.

We believe it is the single most important human rights instrument adopted since the founding of the UN, and we are honored to consult with the Committee about it.

The United States made a major effort to detail for the Committee how the rights reflected in the Covenant are cherished by the American people and are protected under U.S. law and by U.S. institutions. We think it is one of the most comprehensive reports ever received by the Committee from any country. We had a large multi-agency, senior-level delegation and made an effort to address every question raised in the time available.

The Committee loses perspective and credibility when it spends more time criticizing the United States than countries with no civil and political rights.

For example, the recent Committee Conclusions and Recommendations on North Korea was about half the length of that on the United States.

On some fundamental matters we do not agree with the Committee, and are disappointed with the Committee's findings on these matters. For example, the U.S. has been clear since the Covenant was first negotiated by Eleanor Roosevelt in 1950 that it only applies in the national territory of a party. It does not, and never has, applied to the U.S. military or U.S. military installations abroad. Other domestic and international law, including the laws of war, govern these activities.

State Department Legal Adviser John Bellinger noted, "We can understand the Committee's desire to have the Convention apply outside the territory of a State Party but we must accept the Convention the way it was written, not the way the Committee wishes it to be. Despite this clear limitation of its mandate, the Committee has made at least six separate recommendations that concern U.S. activities outside the territorial United States that are governed by the laws of war. We find these conclusions outside the scope of the Committee's mandate an unfortunate diversion of the Committee's attention."

The Committee has often made only the barest connection between the Covenant and its proposed recommendation. In a few cases, that connection would appear to be lacking in its entirety. At first reading, many of the conclusions and recommendations

appears to have failed to take into account much of the information we provided in our written and oral responses to the Committee. Given the limited mandate of the Committee's review, we find this extremely disappointing.

The Committee has made recommendations that address matters that are under active consideration by federal and state courts under U.S. law, and by state and federal agencies.

We are an open society, accustomed to robust public policy debate, and will be happy to examine the Committee's views closely and draw any appropriate conclusions from them.

The United States Government looks forward to speaking further about the Conclusions and Recommendations after it has had a chance to read and study them further.

B. DISCRIMINATION

1. Race

On June 26, 2006, Patrick Smeller, Political Officer, U.S. Mission Geneva, delivered a statement to the Human Rights Council urging full implementation of the Convention on the Elimination of All Forms of Racial Discrimination rather than a new instrument on racism. Mr. Smeller's statement is set forth below and available at *www.usmission.ch/Press2006/0626Smeller.html*.

We share the concern that many persons worldwide are still subject to racism. The United States remains committed to the elimination of all forms of racial discrimination.

My government firmly believes, however, that it is not a new instrument like a proposed Optional Protocol, but the full and effective implementation of the Convention on the Elimination of All Forms of Racial Discrimination that will help us reach our shared goal of eliminating all forms of racial discrimination.

The Committee on the Elimination of All Forms of Racial Discrimination has itself stated that, "It is the States' failure to ratify or implement the Convention, rather than gaps in the Convention

itself, which the Committee has identified as the key issue in combating contemporary forms of racism."

We join the Secretary General and others in urging the Council as a new institution to focus on implementation, rather than norm creation, at this time. As noted by High Commissioner Arbour in her speech last Monday, "Victims of human rights abuses all over the world, and future generations will judge us by our willingness and ability to shed the comfort of habit, to fight inertia, reject expediency, and fulfill promises with action." If there is, however, a continued desire to discuss complementary standards or additional instruments to address gaps in international human rights law with respect to racism, the appropriate forum is with the States Parties to the Convention. Article 23 describes the procedure for proposing amendments to the Convention, and it is for the States Parties to treaties to determine through the relevant treaty mechanisms whether or how to amend such instruments.

2. Gender

a. Support for UN Development Fund for Women

On June 22, 2006, Richard Behrend, U.S. Representative to the UNDP/UNFPA Executive Board, delivered a statement on Agenda Item 14, explaining U.S. support for the UN Development Fund for Women ("UNIFEM") in the context of support for advancement of women internationally. The full text of the statement, excerpted below, is available at *www.un.int/usa/statm_062206.htm*.

* * * *

The United States is committed to legal rights for women. For example, Women's Justice and Empowerment Initiative (WJEI) for Africa is a $55 million, three-year program to help countries to strengthen the capacities of legal systems to protect women and punish violators. The Initiative trains police, prosecutors, and judges to handle cases of sexual violence and abuse; improves shelters

and counseling programs; and uses high-level engagement, conferences, public awareness campaigns, and education to emphasize the need for women's justice and empowerment.

The U.S. government is the largest donor of bilateral reproductive health and family planning assistance: approximately $437 million this year.

It is a high priority of the United States to fight human trafficking, which disproportionately affects women. In 2000, the U.S. Congress passed the Trafficking Victims Protection Act (TVPA). The Act protects and assists victims in the United States and abroad. Since 2001, we have provided about $375 million to support anti-trafficking efforts in over 120 countries, including assistance to victims of sex trafficking. This amount includes funding in support of President Bush's anti-trafficking initiative, announced in his 2003 speech to the United Nations General Assembly.

At the 2005 session of the UN Commission on the Status of Women, the United States sponsored a resolution on "Eliminating Demand for Trafficked Women and Girls for All Forms of Exploitation, " the first UN resolution on this issue. It was adopted by consensus with over 50 co-sponsors.

The United States supports UNIFEM as an important institution for the advancement of women and protection of women against violence. We have increased our funding to UNIFEM in recent years.

* * * *

b. Advancement of women

On October 9, 2006, Barbara Barrett, Senior Adviser to the U.S. Mission to the United Nations, addressed the third committee on the advancement of women. The full text of her statement, excerpted below, is available at *www.usunnewyork.usmission.gov/06_263.htm*.

It is an honor to be here this afternoon to discuss agenda item 61, the advancement of women. Over the last few decades, attention to gender issues, at the UN and elsewhere, has brought about rec-

ognition that respect and empowerment for women are pragmatic necessities, as well as a moral imperative. Women in all societies deserve the same opportunities and protections as men, they are endowed with the same rights as men, and women should be equal in dignity with men. As Secretary Rice has said, "No society can expect to flourish with half of its people sitting on the sidelines, with no opportunity to develop their talents, to contribute to their economy, or to play an equal part in the lives of their nations." the U.S. has been engaged in sustained efforts.

Today I'd like to mention some recent U.S. activities to support women and their development, both in the realm of combating violence against women and in empowering women. We are concerned that human trafficking not only harms victims physically and emotionally, but also threatens public health and fuels organized crime. The U.S. has provided over $375 million bilaterally in the last five years towards anti-trafficking programs in 120 countries and regularly supports international organizations in assisting countries' efforts to combat trafficking.

Countering demand is an important component in the fight against trafficking. U.S. law forbids engaging in child sex tourism anywhere in the world, traveling with the intent to engage in illicit sexual conduct or operating a child sex tour business. Penalties can range up to 30 years in prison. We take this pernicious problem very seriously. In addition, we have programs in the United States through the Department of Health and Human Services, the Department of Justice and various NGOs to identify and assist victims. The Department of State helps reunite victims of trafficking with their families.

* * * *

c. Violence against women

(1) Human Rights Council report

On September 20, 2006, U.S. Alternate Representative Velia M. DePirro addressed the Human Rights Council on reports

of the special rapporteurs on trafficking in persons and violence against women, stating:

> With regard to violence against women, while the Special Rapporteur's report raises difficult legal issues that merit careful consideration, such as the implications of a "due diligence" approach, we strongly support the need to draw attention to this important issue.
>
> We have taken extensive actions within our domestic system to combat violence against women, including over 700 new domestic violence-related enactments (e.g., laws and regulations). And Congress has enacted three major pieces of legislation that recognize the seriousness of domestic violence and the importance of a nationwide response.

The statement is available in full at *www.usmission.ch/HRUpdates/0920TraffickingPersons.htm*.

(2) UN General Assembly Resolution

On December 19, 2006, the UN General Assembly adopted Resolution 61/143, Intensification of Efforts to Eliminate all forms of Violence against Women, without a vote. On November 22, 2006, the United States had joined consensus in adoption of the text in the Third Committee. Ambassador Richard T. Miller, U.S. Representative to UN Economic and Social Council, provided an explanation of the U.S. views on the resolution at that time and requested that it be included for the record. The full text of Ambassador Miller's statement, excerpted below, is available at *www.usunnewyork.usmission.gov/06_406.htm*.

---

* * * *

The United States is deeply committed to action, by individual governments and multilaterally, to combat violence against women. Whether individual cases of violent degradation or patterns of

abuse left unstopped, this phenomenon is a basic affront to human dignity. We must prevent violence against women wherever possible, as well as help the victims and hold accountable the perpetrators where not.

Preambulatory paragraph 2 reaffirms the Beijing and Beijing 5 documents and the CSW 2005 Declaration. The Beijing Declaration and Platform for Action express important political goals that the United States endorses. We reaffirm the goals, objectives, and commitments of the Beijing Declaration and Platform for Action based on several understandings. We understand that these documents constitute a policy framework that does not create international legal rights or legally binding obligations on states under international law.

During the 2005 meeting of the UN Commission on the Status of Women, many member states affirmed that the Beijing documents create no new international rights, including a so-called "right" to abortion, and the CSW Chairperson confirmed this understanding.

The United States understands that the use of the phrase "reproductive health" in this resolution does not create any rights and cannot be interpreted to constitute support, endorsement, or promotion of abortion.

OP 2 "takes note with appreciation" the work of the CEDAW Committee. We interpret this paragraph to refer to the Committee's contributions to Beijing follow-up, rather than support or endorsement of all of its recommendations.

* * * *

3. Religion

a. Report on International Religious Freedom and designations of countries of particular concern

On September 15, 2006, the Department of State released the 2006 Annual Report on International Religious Freedom covering the period July 1, 2005, through June 30, 2006, transmitted to Congress pursuant to § 102(b) of the International Religious Freedom Act of 1998, 22 U.S.C. § 6412(b). The report

is available at *www.state.gov/g/drl/rls/irf/2006/*. In remarks to the press on the release of the report, John V. Hanford III, Ambassador at Large for International Religious Freedom, explained:

> The 2006 Annual Report on International Religious Freedom covers 197 countries and territories. The pages of each country report distill the experience of the past year into a whole that we hope will spur debate in other countries, hold governments accountable to their international commitments, speak out on behalf of the persecuted, and in the end, provide a sense of how well we are living up to our own ideals.

Ambassador Hanford's remarks are available at *www.state.gov/g/drl/rls/rm/2006/72303.htm*.

On November 13, 2006, the State Department transmitted to Congress the 2006 designations of countries of particular concern for severe violations of religious freedom. A press briefing by Ambassador Hanford on that date is excerpted below.

. . . Today the Department of State transmitted to Congress the 2006 Designations of Countries of Particular Concern, or CPCs, for Severe Violations of Religious Freedom. Secretary Rice designated one new CPC, Uzbekistan, and re-designated seven countries which were on the CPC list last year: Burma, China, the Democratic People's Republic of Korea, Eritrea, Iran, Saudi Arabia and Sudan. This year, as a result of many positive steps taken by the Government of Vietnam over the last two years, Vietnam was not re-designated.

The International Religious Freedom Act requires the annual designation of CPCs where governments have engaged in or tolerated particularly severe violations of religious freedom. We are committed to seeing improvements in each of these countries, improvements such as those that we have seen in Vietnam. Our decision not to re-designate Vietnam is one of the most significant announcements that we're making this year. When Vietnam was

first added to the list of Countries of Particular Concern in 2004, conditions for many religious believers were dire, with campaigns to force people to renounce their faith in certain regions, dozens of religious prisoners and the harassment and physical mistreatment of some believers.

Today the Government of Vietnam has made significant improvements towards advancing religious freedom. Though important work remains to be done, Vietnam can no longer be identified as a severe violator of religious freedom, as defined under the International Religious Freedom Act. This marks the first time that a country has made sufficient progress as a result of diplomatic engagement to be removed from the CPC list and we view this as a very important milestone.

* * * *

The Government of Uzbekistan, on the other hand, has been added to the list this year because it has chosen the path of increasing restrictions on religious expression and has refused to engage in meaningful discussions with us on this issue. Violations of religious freedom in Uzbekistan are widespread and severe, and the situation has continued to deteriorate this year. The already extremely restrictive religion law has been further tightened, congregations have been harassed and deregistered, and fines have been dramatically raised.

* * * *

In summary, Uzbekistan's abysmal record on religious freedom and other human rights has evoked widespread condemnation from the international community and NGOs. And so today we are taking the step of designating Uzbekistan as a Country of Particular Concern. Our hope, as always, is that this step will encourage the government to rethink its policies and undertake the necessary reforms.

Religious freedom is a cherished constitutional right for Americans. It is also a universal right, enshrined time and time again in international law and declarations. Our goal is to promote the fundamental right of freedom of religion through our bilateral relationships, our multilateral work and our ongoing discussions with faith communities around the world. . . .

b. UN General Assembly: Interreligious and cultural dialogue

On December 20, 2006, the United States joined consensus on UN General Assembly Resolution 61/1221, "Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace," as orally revised. Operative paragraphs 12 and 14, as so revised on that date, provide that the General Assembly:

> [12] Encourages the promotion of dialogue among the media from all cultures and civilizations, emphasizes that everyone has the right to freedom of expression, and reaffirms that the exercise of this right carries with it special duties and responsibilities and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and necessary for the respect of the rights or reputations of others, the protection of national security or of public order, or of public health or morals;
>
> * * * *
>
> [14] Decides to convene in 2007 a high-level dialogue on interreligious and intercultural cooperation for the promotion of tolerance, understanding and universal respect on matters of freedom of religion or belief and cultural diversity, in coordination with other similar initiatives in this area"

See U.N. Doc. A/61/PV.83 at 17. Ambassador Richard T. Miller, U.S. Representative to the UN Economic and Social Council, provided an explanation of the U.S. decision to join consensus as set forth below and available *id*. at 19.

The United States was founded on the principle of freedom of religion. The pluralism of religions and open dialogue as basic premises have benefited the tolerance, growth and vitality of our society for over 230 years.

The text before us has much to recommend. It acknowledges the importance of religious and cultural diversity, and affirms that

mutual understanding and dialogue are important for achieving a true and lasting peace. It recognizes the importance of education. And it recognizes the vital role of the media, the ability of which to work freely and objectively is crucial to open and honest dialogue, even when the news it reports is unpleasant or critical.

We appreciate the cosponsors agreement to modify OP12 to reflect exactly the language in the International Covenant on Civil and Political Rights (ICCPR). We still are disappointed, however, that the resolution highlights limitations on freedom of expression. In a resolution on interreligious dialogue and in a paragraph on the media, highlighting speech restrictions gives a potential chilling effect. We are greatly troubled by the potential for arbitrary government-imposed restrictions in these areas, where tolerance and diversity are vitally important.

Our joining consensus on this resolution as regards OP12 is predicated upon the US Declaration on Article 19 of the ICCPR, and US Constitutional provisions concerning freedom of expression. We do not wish to fetter freedom of expression, particularly in the context of interreligious and intercultural dialogue. Such dialogue can be effective only when it is completely open and free. We must be able to engage in an open exchange of views without fear of recrimination if we are to truly develop the understanding and trust necessary to get along and live with each other.

Regarding OP14, we understand that the provisions called for will not give rise to additional financial implications. We wish to note that the U.S. delegation also generally opposes any intersessional departures that would add to, or alter the Calendar of Conferences and Meetings or that would give rise to additional financial implications.

c. UN Human Rights Council: Religious freedom and freedom of expression

In a statement on September 22, 2006, Ambassador Tichenor addressed the HRC on religious intolerance and freedom of expression as set forth below and available at *www.usmission.ch/Press2006/0922TichenorReligiousIntolerance.html*.

The United States shares the concern of those who are disturbed by incitement to racial and religious hatred, and who favor the promotion of tolerance. The promotion of tolerance goes hand in hand with the respect for religious freedom—a fundamental belief in the founding of the United States that remains a core objective of U.S. foreign policy. It is articulated in our Constitution as well as Article 18 of the Universal Declaration of Human Rights, which clearly states that everyone has the right to freedom of thought, conscience and religion.

The vast majority of the world's people have religious beliefs that they cherish and hold dear. It is because people view religion as playing a central role in their lives that many regard religious freedom as the most important of human rights. At the same time, global trends often lead to significant overlap between religious identity and ethnicity, class, language group, or political affiliation. Invariably, there will be a natural tension between respect for religious diversity and freedom of expression, a tension that we have all seen erupt in serious, sometimes violent misunderstanding. The sacred principle of freedom of speech and expression needs to be preserved, as we promote respectful dialogue between cultures and religions as the antidote to prevent intolerant and hateful acts against individuals of particular religious groups.

Those exercising their legitimate freedom of expression must be sensitive to the potential for harm their words may cause. In turn, States must ensure that religious freedom is respected in their countries for *all* religions, be they Christian, Muslim, or Jewish, or be they Hindu, Sikh, Buddhist, Baha'i or any other religion. The freedoms not to affiliate with any religion at all, to change religion or belief, and to manifest religion or belief in teaching, practice, worship, and observance must be respected by all UN members. For surely, promoting tolerance is the first necessary step to developing a genuine respect for our differences—and also to laying the foundation for understanding and fully appreciating our similarities.

* * * *

4. Disabilities

On August 14, 2006, Steven Hill, Office of the Legal Adviser, U.S. Department of State, and head of the U.S. delegation to the Eighth Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, explained the U.S. views on the convention, as excerpted below. The full text of Mr. Hill's statement is available at *www.usunnewyork.usmission.gov/06_204.htm*.

* * * *

Promoting and protecting the rights and inherent dignity and worth of persons with disabilities is the foundation of our national law and policy, including the President's New Freedom Initiative to fulfill the United States commitment to the rights of persons with disabilities.

We have fielded a delegation that includes representatives who have long experience with our national disabilities law and policy and our efforts to promote international cooperation through disabilities-related foreign assistance projects.

* * * *

Having listened to other delegations and members of civil society, we recognize that the Convention will be a useful tool for many other states as they develop their national legal frameworks.

As a result, we support a timely conclusion of the Ad Hoc Committee's work, and look forward to seeing the Convention move to the General Assembly.

We are satisfied with many elements of the current text—particularly its focus on equality and non-discrimination. We think they reflect the spirit of mutual respect and constructive collaboration that has characterized our meetings.

That being said, we have concerns with certain draft provisions.

* * * *

The United States had made clear from the beginning of the negotiations that it did not intend to become a party to

the convention given the domestic regime already in place in the United States, including the Americans with Disabilities Act. Nevertheless, the United States participated in the negotiations and offered technical assistance based on its domestic experience. *See Digest 2003* at 299-303. In keeping with this approach, the United States provided a number of fact sheets concerning disabilities-related law and practice in the United States during the negotiations. *See, e.g*, information sheets on Article 13, Access to Justice; Article 25, Access to Health Care; and Article 29, Voting, made available at the seventh meeting of the ad hoc committee in January 2006, *www.un.org/esa/socdev/enable/rights/ahc7usa.htm*.

The convention was adopted by the ad hoc committee on August 28, 2006, and by the UN General Assembly on December 20, 2006 in Resolution 61/106. The text of the convention is annexed to the resolution. In a statement of December 13, 2006, by Ambassador Richard T. Miller, U.S. Representative to the UN Economic and Social Council, the United States welcomed the convention's adoption and commented as excerpted below. The full text of Mr. Miller's statement is available at *www.usunnewyork.usmission.gov/06_396.htm*.

* * * *

There is much to be proud of in this Convention. It is based on respect for the inherent dignity and worth of all persons with disabilities. It contains strong provisions on a variety of important issues, including political participation, access to justice, accessibility, health, the crucial role of family, and end of life issues.

The Convention is firmly rooted in the principles of equality and non-discrimination. As the Chairperson and many other delegations, including the United States, have noted on countless occasions over the course of negotiations, the treaty reinforces existing rights and is aimed at assuring that persons with disabilities will be treated on an equal basis with others.

This approach was reflected in oral statements and in various places in the written *travaux preparatoires,* including in a footnote

to the draft text of Article 25 that appeared in the report of the Seventh Ad Hoc Committee.

In this regard, the United States understands that the phrase "reproductive health" in Article 25(a) of the draft Convention does not include abortion, and its use in that Article does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion. We stated this understanding at the time of adoption of the Convention in the Ad Hoc Committee, and note that no other delegation suggested a different understanding of this term.

We would also like to comment on preambular paragraph (u) of the Convention.

The United States called for a separate vote on this paragraph and voted against it because we saw it as an attempt to politicize what had otherwise been a very productive and focused negotiation process.

We were also concerned that the reference in this human rights convention to armed conflict and foreign occupation, which are governed by international humanitarian law and not human rights law, would create unnecessary legal confusion and thus potentially undermine the extensive protections already available under international humanitarian law to protected persons in those situations. The United States wishes to note for the official record its continued concerns related to this preambular paragraph in the Convention. We note that these concerns also apply to Article 11, which deals with situations of armed conflict.

* * * *

C. CHILDREN

1. Sale of Children, Child Prostitution and Child Pornography

On September 25, 2006, Ambassador Tichenor addressed the Human Rights Council on the report of the special rapporteur on the sale of children, child prostitution and child pornography. The statement is set forth below and available at *www.usmission.ch/HRUpdates/0925Children.htm*.

The United States welcomes Mr. Petit's report.

We are particularly appreciative of his very apt decision to focus on the demand factor in the commercial exploitation of children. We agree with him that additional attention is needed to this crucial aspect of the problem.

The United States is proud to be a State Party to the Optional Protocol to the Convention on the Rights of the Child on this subject. We are grateful that the report notes the extensive actions that my government—and others—have taken to combat this scourge.

We have two comments related to this report:

First, we appreciate its mention of the problem of child sex tourism, a shameful assault on the dignity of children and a form of violent child abuse with devastating consequences for its victims. It would be useful if the Special Rapporteur could in the future expand on his views of the measures that states should take on a priority basis in this area.

Second, we have noted the Special Rapporteur's stated intention to coordinate his work closely with the Special Rapporteur on Trafficking in Persons. This makes particular sense to us because there are many similarities between the two mandates. . . .

2. Rights of the Child

On November 22, 2006, Ambassador Richard T. Miller, U.S. Representative to the UN Economic and Social Council, provided an explanation of the U.S. vote against adoption of agenda item 63A/C.3/61/L.16: Rights of the Child. The full text of Ambassador Miller's remarks, excerpted below, is available at *www.un.int/usa/06_407.htm. See* UN General Assembly Resolution 61/146.

* * * *

The United States . . . is constructively and generously engaged in a wide variety of multilateral and bilateral activities that benefit children around the world. The U.S. respects and appreciates the interests and contributions of other nations and organizations to

promoting and protecting the rights of children, and to enhancing the quality of their lives in direct ways.

We are committed to ensuring that the protection of the rights of children is fully integrated into American foreign policy. It is for this reason that the United States supports many of the principles underlying this resolution.

For example, the U.S. has ratified the two Optional Protocols to the Convention on the Rights of the Child relating to the involvement of children in armed conflict and to the sale of children, child pornography, and prostitution.

The Convention on the Rights of the Child contains many positive principles and standards, which the United States respects in its overall conduct to a far greater extent than many States Parties.

However, the U.S. has repeatedly made clear that the Convention raises a number of concerns; in particular, the Convention conflicts with the authority of parents, and the provisions of state and local law in the United States. Many of the activities covered by the Convention in areas such as education, health and criminal justice are primarily the responsibility of state and local governments in the U.S. In addition, the Convention, in some case[s]—such as the degree to which children should participate in decisions affecting themselves, or have the right to choose actions independently of parental control—sets up a tension between the rights of children and parental authority. U.S. laws generally place greater emphasis on the duties of parents to protect and care for children, and apportion rights between adults and children in a manner different from the Convention.

We cannot accept this resolution's over-emphasis on the Convention on the Rights of the Child or its assertion that the Convention "must constitute the standard in the promotion and protection of the rights of the child." While the Convention may touch upon most issues confronting children, other international instruments address particular problems in a far more comprehensive and effective manner. Thus, my delegation considers it unreasonable that the text fails to list by name ILO conventions that address child labor matters, the Hague Convention on International Child Abductions, the leading Refugee instruments, and the International Covenant on Civil and Political Rights.

The United States does not support the broad and evaluative, rather than factual, reference to the International Criminal Court in paragraphs OP 17 and OP 34(d).

We also regret the weakness of the language on the rights of children in international child custody cases to visitation with and access to both parents, as well as the weakness of language on international parental or familial child abduction. In particular, we regret the failure to address the need for legal enforcement of rights in these areas.

My delegation believes that there are some improvements in this text over its predecessors and appreciates the work of the co-sponsors in several areas.

However, what is needed is a text that is shorter and targeted on specific issues of critical importance to children, as well as one that concentrates on matters not addressed in other resolutions.

* * * *

3. Children in Armed Conflict

On November 28, 2006, Ambassador Jackie W. Sanders, Alternate U.S. Representative to the UN for Special Political Affairs, addressed the Security Council on the report of the Secretary-General on children and armed conflict. Ambassador Sanders' remarks, excerpted below, are available in full at *www.un.int/usa/06_368.htm.*

---

* * * *

The Secretary General's Report describes the terrible circumstances where the use of child soldiers continues and highlights as current issues of concern child victims in the Middle East and the Great Lakes region of Africa. The United States fully supports the request for all parties listed in the Annexes of the Report to halt recruitment and use of child soldiers. We believe the current plight of child soldiers is particularly dire in Burma, Sudan, and parts of the Democratic Republic of the Congo and Northern Uganda, where the Lord's Resistance Army operates.

According to some reports, Burma is thought to have the largest number of child soldiers in the world. Human Rights Watch has documented the widespread forced recruitment of boys as young as eleven by Burma's national army. Burma's military regime has acknowledged the recruitment of child soldiers and claimed to have taken action against five officials involved in the forced recruitment of child soldiers since 2003 and to have set up a Committee to Prevent the Recruitment of Child Soldiers. Nonetheless, evidence continues to emerge that the practice of recruiting child soldiers has not ceased. A September 2006 report issued by the Thailand-based Human Rights Education Institute of Burma stated that little had changed with regard to Burma's forced recruitment of child soldiers and that the regime had done little to protect children from being recruited into the military. The Coalition to Stop the Use of Child Soldiers estimated that 20 percent of the Burmese army and ethnic insurgency forces, about 90,000, were under the age of 18. Child soldiers are also used in ethnic armies. We encourage Burma's neighbors to provide protection to any child soldiers who desert from the national or ethnic armies and to allow international relief organizations, including the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF), to provide humanitarian assistance to resettle and reintegrate them into society.

The military forces of the Government of Burma also use the systematic rape of women and girls, particularly of the Shan, Karen, Karenni, and other ethnic minorities, as an instrument of armed conflict. The United States encourages members, Parties, States, and international organizations to provide all appropriate protection and assistance to victims of these atrocities.

In Sudan, government-armed forces, government forces, and various armed groups continue to recruit and use child soldiers in armed conflict. In IDP camps in Darfur and in refugee camps in neighboring Chad, we have seen the tragic recruitment of young men and boys by various parties to the Darfur conflict. Also in Darfur, rape continues to be used as a weapon of war against young women and girls. The Government of Sudan, which is a party to the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the

06-Cummins-Chap06.indd 388 10/22/07 11:40:22 PM

Involvement of Children in Armed Conflict, must accept responsibility for the widespread problem of recruitment and use of child soldiers and take immediate steps to halt these practices.

The current negotiations between the Government of Uganda and the Lord's Resistance Army (LRA) seek an end to the 20-year conflict, which has produced 2 million internally displaced people and roughly 25,000 abducted children by the LRA. Children abducted by the LRA are often forced to participate in acts of extreme violence, including beating or hacking to death fellow child captives who have tried to escape. Girls as young as twelve are given to commanders as "wives." Some abducted children have managed to escape, while others have died from disease, mistreatment, or combat wounds. Although child abductions are down because of a decrease of LRA activity in northern Uganda, many of the abductees remain under control of the LRA.

* * * *

The United States fully supports the following measures:

—Active monitoring of the governments and armed groups that have already been named in the Secretary General's report;
—Direct dialogue involving the governments and armed groups concerned in order to develop action plans to eliminate the use of child soldiers.
—Continuing efforts aimed at halting the sexual exploitation and abuse of vulnerable children.

* * * *

We welcome the Secretary-General's report and are reviewing its specific recommendations closely. We look forward to working with other Council Members on closer review of the report.

D. ECONOMIC, SOCIAL AND CULTURAL ISSUES

The United States participated in the 32nd session of the Committee on World Food Security ("CFS"), meeting in Rome, Italy from October 30-November 4, 2006. At the

131st session of the FAO Council, November 20-25, 2006, in Rome, the United States commented on the report of the CFS 32nd session as excerpted below. The full text of the U.S. comments is available at *www.state.gov/s/l/c8183.htm*.

The United States was pleased with the consensus outcome of the Committee on World Food Security. All participants recognized that if we are to meet the World Food Summit goal to reduce by half the number of undernourished people in the world, it is imperative that developed and developing countries, NGOs, the private sector, and others work in partnership as never before.

* * * *

We would like to address one more issue that received attention in the CFS—the role of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. The United States was pleased to join consensus in adopting the Voluntary Guidelines in 2004. We view the Voluntary Guidelines as a useful toolkit of policies and strategies that countries may consider in their efforts to enhance their food security. It is important to remember, however, that they are voluntary, and that governments and other actors are invited to implement them as they see fit. For this reason, the United States does not support mainstreaming the Voluntary Guidelines in the work of FAO.

The Voluntary Guidelines referred to above were adopted in Rome in September 2004 by the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security ("IGWG") and by the FAO Council on November 23, 2004. The text of the guidelines is attached as Annex 1 to the Final Report of the Chair of the Working Group, CL 127/10-Sup.1, available at *www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm#a1; see also Digest 2004* at 287-88. During the second session of the IGWG meeting from October 27-29 at FAO

headquarters in Rome, Robert Harris, Assistant Legal Adviser for Human Rights and Refugee Affairs, U.S. Department of State and head of the U.S. delegation, provided the U.S. views on certain aspects of the Voluntary Guidelines. The full text of points prepared for Mr. Harris's comments, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

1. Characterization of the "right" in the Voluntary Guidelines

- In our discussion of the legal issues related to the Voluntary Guidelines, there are many general issues in which delegations have expressed common views and a few important issues of divergence.
- Delegations seem to agree:
  - that the Voluntary Guidelines are, by definition, voluntary, that they do not create new obligation on States, and that their drafting should not contain words of legal obligation;
  - that these negotiations of the Voluntary Guidelines are not a forum to create new international law, to renegotiate existing international agreements, or to attempt to forge consensus on differing interpretations of international treaties;
  - that statements regarding the obligations of states parties to treaties need to be clearly expressed and should also be clear that such obligations apply only with respect to such states parties; and
  - that the Voluntary Guidelines should not appear to derogate from existing international treaty obligations.
- These points of convergence, however, also contain the seeds of subjects where views of delegations have diverged. Those disagreements have been most marked in areas of the draft that have attempted to describe the underlying scope and contours of their obligations under particular treaties.
- As the United States said in its opening comments, countries are unwilling to accept descriptions of international

treaties and international law generally with which they disagree. Nor, as a general matter, is it reasonable in a negotiation of a non-binding instrument such as this to expect a country to agree to a description of international law with which it disagrees.

- For this reason, political instruments typically do not attempt to characterize or describe the specific scope of obligations contained in international treaties, but simply take note of them or, where appropriate, quote word-for-word the actual language in the treaty.
    - Attempts to characterize or paraphrase the obligations are inherently controversial and counterproductive.
    - It is the job of the parties to treaties to determine the content of their obligations in good faith pursuant to international treaty law as set out, under customary international law, in the Vienna Convention on the Law of Treaties.
- Today, speakers have quoted language from General Comment 12 of the Committee of Economic, Social and cultural Rights about what are described as obligations under the ESC Covenant to "respect, protect and fulfill" the right to adequate food.
    - This language appears nowhere in the Covenant.
    - Nor does the Covenant even provide for the existence of the Committee, much less give it a mandate to issue legally binding or legally authoritative interpretations of its terms.
    - The United States has great respect for the Committee and similar Committees established under other human rights treaties. States sometimes agree with interpretations offered by such committees. Sometimes states do not agree, and there is nothing in the ESC Covenant or elsewhere that provides that they are bound to.
- The problem with respect to paragraph 2 in the section "The Right to Adequate Food and Food Security" is that the United States, a signatory to the ESC Covenant, fundamentally disagrees that the characterization of the right in the current draft of this paragraph or in General Comment

12 is an accurate description of the rights contained in the ESC Covenant.

* * * *

- As a final matter, I would like to explain why my government cares so deeply about this issue, even though it has not become a State Party to the ESC Covenant.
  - First, the United States is a signatory, and signatories have certain responsibilities under international treaty law.
  - Second, the precedent of citing non-binding General Comments as authoritative law could have applications in settings in which the United States is a party.

* * * *

2. Justiciability of, and third party responsibilities relating to, the progressive realization of the right to adequate food

- A second subject upon which there have been differing views among delegations involves questions relating to the justiciability of, and third party responsibilities relating to, the progressive realization of the right to adequate food
  - . . . [A]s described above we do not believe that the right to food is justiciable under the International Covenant on Economic, Social and Cultural Rights or other instruments of international law.
  - Research circulated by the FAO Secretariat indicates that there is a very wide array of methods for countries under national laws to deal with providing access to food.
  - Some countries may choose to create a right under their national law; some may not.
  - Even among those that have a right under national law, many do not create a right for individuals to bring

lawsuits against their government to enforce such rights.

- It is this private right to bring lawsuits, which is what is typically meant by those arguing for the creation of a "justiciable" right.
- For similar reasons, we do not agree with the ESC Committee's General Comment 12 that countries have an obligation to "fulfill" or "provide" a right to adequate food to persons in their territory.
- Regarding third parties, we do not agree there is a formal international legal obligation to "protect" the progressive realization of the right to adequate food.

* * * *

E. INDIGENOUS PEOPLE

On October 16, 2006, addressing the Third Committee of the UN General Assembly, Rosemary Banks, Permanent Representative to the United Nations for New Zealand, delivered a statement on behalf of New Zealand, Australia, and the United States, expressing concerns with the draft declaration on the rights of indigenous peoples. Ambassador Banks' statement is set forth below in full and available at *www.un.int/usa/06_294.htm*. The text of the declaration was adopted by the Human Rights Council in June 2006, available as U.N. Doc. A/HRC/1/L.10 (June 30, 2006). On November 28, 2006, the Third Committee decided to delay a vote on the declaration. U.N. Doc. A/C.3/61/L.18/Rev.1. *See* press release at *www.un.org/News/Press/docs/2006/gashc3878.doc.htm*. The October joint statement is set forth below. *See also* discussion of U.S. relationship with Indian tribes in the context of the ICCPR in A.4.b. *supra*.

The Working Group charged with drafting a declaration on the rights of indigenous peoples was unable to reach a consensus on a text. The text adopted by vote by the Human Rights Council in

June was prepared and submitted after the negotiations had concluded. The Chair of the negotiations has acknowledged, on several occasions, that his text does not in fact enjoy consensus. Equally disappointing, there has been no opportunity for States to discuss this new Chair's text collectively. We are also concerned that the Human Rights Council and its President rejected calls that we and others, such as Canada, made urging for more time to improve the text so that it could enjoy universal support. This process is extraordinary in any multilateral negotiation and sets a poor precedent with respect to the work and role of the Human Rights Council.

Mr Chairman, in order for a declaration to provide States and indigenous peoples with a blueprint for harmonious and constructive relationships, it must be clear, transparent and capable of implementation. Unfortunately, the text before us fails on all three counts. It will risk endless and conflicting interpretations and debate in its application. That is apparent both from the text of the declaration and from the interpretative statements that were made when the text was adopted at the Human Rights Council and from those that are likely to be made at the adoption of the declaration by the General Assembly.

Mr Chairman, we worked hard for a declaration that could become a tangible and ongoing standard of achievement that would be universally accepted, observed and upheld. The situation in some countries for indigenous peoples is very worrying indeed. What the world needs is a declaration that can make a practical and positive difference in the lives of indigenous peoples in every region. Instead, the text before us is confusing, unworkable, contradictory and deeply flawed. Mr Chairman, our countries therefore cannot support its adoption.

- Self-Determination. For example, Mr Chairman, the provisions for articulating self-determination for indigenous peoples in this text inappropriately reproduce common Article 1 of the Covenants. Self-determination in the Chair's text therefore could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus

threatening the political unity, territorial integrity and the stability of existing UN Member States. The provision regarding territorial integrity and political unity was also inappropriately removed from the Chair's text.

- Veto Power. The text also appears to purport to confer upon a sub-national group, a power of veto over the laws of a democratic legislature. Indigenous peoples in our countries can already fully and freely engage in our democratic decision-making processes. But, our governments cannot accept the notion of creating different classes of citizenship. To give one group in society rights that take precedence over those of others could be discriminatory under the Convention on the Elimination of Racial Discrimination. While the Convention does allow States to take special measures, the power to do so is discretionary, and cannot be used to take measures that are unlimited in duration.
- Lands & Resources. Mr Chairman, the provisions on lands and resources in the text before us are also equally unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. Such provisions would be both arbitrary and impossible to implement.
- Universality of Human Rights. Other important provisions in the Chair's text are potentially discriminatory. It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of States participating in the Working Group was clear that, as has always been the case, human rights are universal and apply in equal measure to all individuals. This means that one group cannot have human rights that are denied to other groups within the same nation-state.
- Redress. The provisions for providing redress, even for those few countries that are addressing this imperative, are unworkable and contradictory.

- Lack of Definition of "Indigenous Peoples". Mr Chairman, we cannot accept the argument some are making, disingenuously, that this declaration will only apply to countries that have significant or obvious indigenous populations. There is no definition of "indigenous peoples" in the text. The lack of definition or scope of application within the Chair's text means that separatist or minority groups, with traditional connections to the territory where they live—in all regions of the globe—could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources. And this text would allow them wrongly to claim international endorsement for exercising such rights.

These fundamental flaws in the text leave us asking ourselves whether States have carefully examined the provisions, and have thought through all the ramifications within their own countries. And if they have, we wonder how they propose to reflect domestically the provisions on the rights to traditional lands and resources, the right of self-determination, the rights to redress and the apparent veto on democratic decision-making, for example.

The flaws in this text, Mr Chairman, run through all of its most significant provisions. Because these provisions are fundamental to interpreting all of the provisions in [the] text, the text as a whole is rendered unacceptable. We note as well that there are calls for State funding that are inconsistent with the role of elected governments to determine resources on the basis of need and not just ethnicity. And the provisions relating to the repatriation of human remains have been unacceptably contrived by some States [to] allow them to maintain their holdings of indigenous remains and artifacts.

We have been reminded on many occasions that this declaration is an aspirational document and not legally binding in any way. That is indeed true, of course. But, we consider that indigenous peoples deserve and need a declaration that is clear, transparent, and capable of implementation and that represents a standard of achievement against which all States can be measured. This text fails all these tests.

Nor do we accept the claims some keep making that this outcome is as good as we could achieve. We were prepared to stay the distance in working further for a document that enjoyed genuine agreement, but others were not. Unfortunately, Mr. Chairman, this declaration will not encourage constructive relationships: on the contrary, it may lead to disputes, bitterness, and unfulfilled expectations on all sides. This is not the outcome we worked hard to achieve for over eleven years. It must also cast doubts over how the United Nations can advance the rights of indigenous peoples with any credibility in the future. But the real tragedy is that it is a sorry outcome for those indigenous peoples who most need it.

Finally, our position on this declaration does not mean that we shall—in any way—resile from the continuing pursuit of the rights of indigenous peoples, internationally and domestically.

As noted in the statement to the Third Committee, the United States, Australia, and New Zealand had provided a joint statement recording their concerns at the time of the adoption of the text for the declaration by the Human Rights Council on June 27, 2006. The text of the June statement is available at *www.us-mission.ch/Press2006/0703IndigenousJoint.htm*.

On the issue of prior informed consent, Peter Vaughn, Representative of Australia, delivered a statement on May 22, 2006, to the UN Permanent Forum on Indigenous Issues on behalf of Australia, New Zealand, and the United States. The full text of the statement, which provides a more detailed review of the issues raised by proposals for a right of free, prior informed consent, is set forth below, and is available at *www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-22-May-2006.php*.

Australia, New Zealand, and the United States of America note the recent efforts of the Permanent Forum to attempt to define and promote a principle or "right" of free, prior informed consent in relation to indigenous peoples (also referred to as a right of prior informed consent, or informed consent or similar). We note also that other international fora are discussing free, prior and

06-Cummins-Chap06.indd 398 10/22/07 11:40:24 PM

informed consent. These include the convention on biological diversity, the [World Intellectual Property Organization Intergovernmental Committee ("WIPO IGC")] on intellectual property and genetic resources, the working group on indigenous populations, UNESCO, UNCTAD, UNDP and the World Bank.

Australia, New Zealand, and the United States of America note that these issues are complex and are significant to indigenous peoples, particularly in light of the historical experience of many indigenous peoples. Australia, New Zealand, and the United States of America consider that discussions about any such principle or "right" are far from complete. The international workshop on free, prior informed consent sponsored by the Permanent Forum in 2005 highlighted that there are widely different views about the content and application of any such principle amongst states and indigenous peoples, and discussions about it in other international forums (such as WIPO and the [Convention on Biological Diversity ("CBD")]) are still ongoing. It is therefore premature to refer to the conclusions of the workshop as reflecting "a common understanding of free, prior informed consent", as stated in the report.

Indeed it is relevant to recall that the recommendations of the workshop are expressed in non-mandatory language, and recognise that the consent process "may include the option of withholding consent", rather than "must". The recommendations also focus on "consultation" and "participation" rather than "consent". Nonetheless Australia, New Zealand, and the United States of America consider that the recommendations are premature and do not reflect "common understanding". Some aspects of the recommendations are also vague in meaning or would be impossible to achieve in most situations, such as "equal access to financial, human, and material resources" for "all sides in a free, prior informed consent process".

It is our firm position that there can be no absolute right of free, prior informed consent that is applicable uniquely to indigenous peoples and that would apply regardless of circumstance. In fact to extend such an overriding right to a specific subset of the national populace would be potentially discriminatory.

It is of course widely accepted that individuals and groups should be consulted about decisions likely to impact on them in particular. This includes the opportunity to participate in the making of such decisions, at the very least through both the formal and informal processes of democratic government, as recognised in the international covenant on civil and political rights.

The Convention on the Elimination of Racial Discrimination also guarantees that there shall be no discrimination in the exercise of such rights, including in the conduct of public affairs (which includes the exercise of legislative, executive or administrative power). But, as acknowledged by the Human Rights Committee, that does not imply a right to choose the modalities of participation in the conduct of public affairs.

It is an entirely different matter to assert, as has been done in the context of developing the draft declaration on the rights of indigenous peoples, that particular sub-groups of citizens have a right of veto (in the form of withholding their consent) over the actions of governments and legislatures. It has been asserted, for example, that the enactment of laws by democratically elected parliaments should be subject to the prior consent or veto of a particular sub-group of the population. And, in addition, that this right should apply to any law, policy, program or decision affecting the group, either directly and specifically or even indirectly by virtue of being part of the total population affected.

Clearly this is not a position that a government, democratically chosen to represent the interests of all its citizens, could accept. Democratic government is about reconciling competing rights and interests.

And indeed that is also why even many human rights (such as the right to freedom of expression or opinion) are not absolutes and why there are general provisions in the key human rights instruments which provide limitations such as for national security and to ensure respect for the rights and freedoms of others.

References have been made (such as in the report of the international workshop sponsored by the Permanent Forum) to various legal or other sources for such a principle of free, prior informed consent. For example, the right of self-determination of all peoples

06-Cummins-Chap06.indd 400 10/22/07 11:40:24 PM

in the human rights covenants, various articles in ILO convention 169 and the WQIP draft declaration on the rights of indigenous peoples, certain recommendations and observations of human rights treaty bodies, and instruments under the convention on biological diversity. However, the meaning of the right of self-determination in the two covenants has been the subject of much disagreement in the working group on the draft declaration on the rights of indigenous peoples. ILO 169 has not been ratified by most states, and the other sources mentioned are still under discussion or are otherwise non-binding. Further discussion about these sources and any "right" of free, prior informed consent—and as to when it might or might not apply—is therefore necessary.

Australia, New Zealand, and the United States of America support efforts to increase indigenous peoples' participation in decisions that affect them, whether in the form of international processes, such as this forum itself, or domestic arrangements designed to protect and advance indigenous interests. This applies in particular to such areas as land and resources, culture and heritage, traditional knowledge and intellectual property. But the fundamental point is that neither indigenous nor non-indigenous peoples enjoy an overarching or exclusive right of free, prior informed consent, regardless of circumstance. Australia, New Zealand, and the United States of America's position is that discussions about indigenous participation in decision-making must recognise that different approaches may be necessary in different circumstances, and must balance the rights and interests of all those affected, including the responsibility of governments to act in the interests of the common good.

F. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

1. Speech to Royal Institute of International Affairs

In a speech to the Royal Institute of International Affairs, Chatham House, "Supporting Justice and Accountability in Iraq," in London on February 9, 2006, State Department

Legal Adviser John B. Bellinger, III, included comments on issues relating to U.S. detention operations. Among other points, he addressed U.S. laws prohibiting torture and cruel, inhuman, and degrading treatment, as excerpted below. Mr. Bellinger's address is available in full at *www.state.gov/s/l/c8183.htm*. *See Digest 2005* at 1030-39 for discussion of the Detainee Treatment Act, Pub. L. No. 109-1418 (2005), and the President's signing statement referred to below.

* * * *

Secretary Rice made clear in December that as a matter of policy the United States will not authorize interrogations involving cruel, inhuman, or degrading treatment, as defined by U.S. obligations under the Convention Against Torture.

More recently, our Congress passed and the President signed the Detainee Treatment Act, which included the well-known McCain Amendment. Contrary to press accounts, the McCain Amendment did not prohibit torture. Our federal criminal laws already prohibited torture. Rather, the McCain Amendment codifies in U.S. law the prohibition against cruel, inhuman, and degrading treatment contained in Article 16 of the Convention Against Torture and makes clear that the prohibition applies to the treatment of all detainees under U.S. control anywhere in the world. Moreover, the Act provides for the first time that federal courts may review the decision of military commissions, a change long-sought by the international community.

I also want to correct a misperception that has arisen concerning the President's signing statement in bringing this Act into law, which included a standard statement indicating that the President would interpret the Act consistent with his authorities under the U.S. Constitution. The President's signing statement reflects a frequently-used executive branch position about the execution of laws within the context of the President's constitutional responsibilities, and was not meant to indicate that the President planned to ignore the provisions of the Act.

* * * *

2. U.S. Implementation of Convention Against Torture

The Committee Against Torture, meeting in Geneva in its 36th session from May 1-19, 2006, considered initial and periodic reports on implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Guatemala, Peru, Qatar, Republic of Georgia, Republic of Korea, Togo, and the United States. Representatives of the United States met with the committee on May 5 and 8, 2006, to discuss the U.S. Second Periodic Report, submitted on May 6, 2005. *See Digest 2005* at 341-71.

a. Committee consideration

The U.S. delegation released a statement at the conclusion of the Committee's consideration of the U.S. report describing U.S. interactions with the committee and others during the period, as excerpted below. The concluding statement is available at *www.usmission.ch/Press2006/0508CatDelstatement.html.*

The U.S. Government has welcomed the opportunity to appear before the Committee Against Torture on May 5 and 8 in order to present our second periodic report under the Convention Against Torture and participate in a dialogue with the Committee. All States Parties to the Convention are required to file periodic reports to the Committee, and the United States takes this obligation seriously.

In addition to a lengthy written report, which the U.S. Government submitted to the Committee in May 2005, the U.S. Government provided extensive written answers to the fifty-nine questions received in advance from the Committee. The U.S. delegation provided an oral summary of these responses during its presentation on May 5. The U.S. delegation received additional oral questions from the Committee on May 5 and provided answers to the Committee on May 8. Having completed its formal presentation to the Committee, and in the interest of the greatest transparency, the United States is pleased to make public the full U.S. written responses to the

Committee's advance questions. http://www.usmission.ch/Press2006/CAT-May5.pdf.

In particular, our delegation appreciated the opportunity to answer questions from the Committee on several key policy and legal issues:

- U.S. officials from *all* government agencies are prohibited from engaging in torture, at *all* times, and in *all* places. All U.S. officials, wherever they may be, are also prohibited from engaging in cruel, inhuman or degrading treatment or punishment against any person in U.S. custody, as defined by our obligations under the Convention Against Torture.
- Despite these prohibitions and mechanisms for enforcing them, some individuals have committed abuses against detainees being held as a result of our current armed conflict in Iraq and against Al Qaida and its affiliates. The United States Government deplores those abuses. The United States investigates all allegations of abuse vigorously and when they are substantiated, holds accountable the perpetrators.
- The United States does not transfer persons to countries where it determines that it is more likely than not that they would be tortured.
- All governments are imperfect because they are made up of human beings who are, by nature, imperfect. One of the great strengths of our nation is its ability to recognize its failures, deal with them, and act to make things better. The United States is committed to complying fully with the obligations it undertook freely in ratifying the Convention Against Torture, both at home and abroad.

The U.S. delegation hopes that the extensive written materials we have provided and our discussions with the Committee will assist the Committee in the preparation of its final report and recommendations. The United States looks forward to receiving the Committee's report and recommendations on May 19.

In addition to the U.S. delegation's meeting with the Committee, the head of the U.S. delegation, John Bellinger, Legal Adviser to

the Secretary of State, met with the United Nations High Commissioner for Human Rights, Louise Arbour. Mr. Bellinger and other members of the U.S. delegation also met with a large group of non-governmental organizations to hear their concerns and respond to their questions about our submissions to the Committee on Torture. Finally, Mr. Bellinger and other members of the delegation also had several useful discussions with President Kellenberger and other officials from the International Committee of the Red Cross.

On May 5, 2006, John B. Bellinger, III, Department of State Legal Adviser and head of the U.S. delegation, and Assistant Secretary of State for Democracy, Human Rights and Labor Barry F. Lowenkron presented opening remarks. Their statements are available at *www.usmission.ch/Press2006/0505BarryLowenkronCAT.htm* and *www.usmission.ch/Press2006/0505BellingerOpenCAT.html*, respectively. Mr. Bellinger's remarks follow.

---

* * * *

The United States recognizes the importance of our international legal obligations and the key role this Committee plays in the treaty-monitoring process. The United States greatly appreciates this opportunity to meet with the Committee and to explain the measures we have taken to give effect to the obligations we have undertaken as a State Party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Secretary of State Rice has emphasized that the United States takes its international obligations seriously. This is reflected in the great lengths to which we have gone to provide you with an extensive report and thorough answers to the many questions you have posed. Our delegation is composed of senior-level officials involved in implementing the Convention. This further demonstrates our commitment not only to fulfilling our obligations under the Convention, but also to engaging in what we expect will be a productive dialogue with you.

At the outset I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, or degrading treatment or punishment worldwide. The President of the United States has made clear that "[t]orture anywhere is an affront to human dignity everywhere" and that "freedom from torture is an inalienable human right." Beyond the protections in our Constitution that Mr. Lowenkron mentioned, United States criminal laws prohibit torture. There are no exceptions to this prohibition. Within the United States, our 50 states and the federal government prohibit conduct that would constitute torture under their civil and criminal laws. Our Congress has also passed laws that provide for severe federal sanctions, both civil and criminal, against those who engage in torture outside the territory of the United States.

And our laws have gone further. Our focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses. The United States has comprehensive legislation that enables citizens and noncitizens of the United States who are victims of torture to bring claims for damages against foreign government officials in U.S. federal courts. Congress has also established and funded programs that assist victims of torture, domestically and overseas. The United States has contributed far more than any other country in the world to the United Nations Voluntary Fund for Victims of Torture. For the years 2000 through 2005, U.S. contributions to the Fund totaled more than 32 million dollars, which is approximately 70% of the total contributions during that period.

And late last year, our Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005. The Act included a provision that codified in law our already-existing policy against the use of cruel, inhuman or degrading treatment as that term is defined under the obligations the United States assumed under the Convention. The law provides that no person "in the custody or under the physical control of the United States Government, regardless of nationality or physical location" shall be subjected to cruel, unusual, and inhumane treatment or punishment prohibited by certain provisions of the U.S. Constitution.

The enactment of the Detainee Treatment Act highlights our nation's commitment to upholding the values of freedom and humanity on which it was founded.

We know that you will have many questions about actions the U.S. Government has taken in response to the terrorist attacks upon our country on September 11. We welcome this dialogue and we are committed to addressing your questions as fully as possible. As we attempt to answer your questions, I would like to ask the Committee to bear in mind a few considerations.

First, some of the matters that are addressed by your questions are the subject of ongoing litigation, and I hope you will understand that our ability to comment in detail on such matters is necessarily constrained.

Second, like other governments, we are not in a position to comment publicly on alleged intelligence activities.

Third, our Second Periodic report and the written answers to your questions contain extensive information about U.S. detainee operations in Guantanamo Bay, Cuba, and in Afghanistan and Iraq. It is the view of the United States that these detention operations are governed by the law of armed conflict, which is the lex specialis applicable to those operations.

As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict.

At the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to apply to armed conflicts. . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture." [U.N. Doc. E/CN.4/1984, March 9, 1984] No country objected to this understanding.

In any case, regardless of the legal analysis, torture is clearly and categorically prohibited under both human rights treaties and the law of armed conflict. The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict.

While the United States maintains its view that the law of armed conflict is the lex specialis governing the detainee operations that we will discuss, we are pleased to provide extensive information about these operations in a sincere spirit of cooperation with the Committee.

In closing I would like to make two final comments.

First, while I am acutely aware of the innumerable allegations that have appeared in the press and in other fora about various U.S. actions, I would ask you not to believe every allegation that you have heard. Allegations about U.S. military or intelligence activities have become so hyperbolic as to be absurd. Critics will now accept virtually any speculation and rumor and circulate them as fact. The U.S. Government has attempted to address as many of these allegations as quickly and as fully as possible. And yet, as much as we would like to deny the numerous inaccurate charges made against our government, because many of the accusations relate to alleged intelligence activities, we have found that we cannot comment upon them except in a general way.

Second, even as we recognize matters of concern to the Committee, we ask that the Committee keep a sense of proportion and perspective. While it is important to deal with problems in a straightforward manner, it does a disservice to the quality of our dialogue, to the treaty monitoring process, to the United States, and, ultimately, to the cause of combating torture around the world to focus exclusively on the allegations and relatively few actual cases of abuse and wrongdoing that have occurred in the context of the U.S. armed conflict with al Qaeda. I do not mean to belittle or shift attention away from these cases in any way. We welcome your questions. But we suggest that this Committee should not lose sight of the fact that these incidents are not systemic. We also suggest that the Committee devote adequate time in these discussions to examining the treatment or conditions that apply domestically with respect to a country of more than 290 million people. The United States is committed to rule of law and has a well-functioning legal system to ensure criminal and civil accountability.

* * * *

The full set of written responses by the United States to the Committee's questions is available at *www.usmission.ch/Press2006/CAT-May5.pdf*; *see also* Chapter 18.4.b.(2). The U.S. delegation's oral summary of the written responses is available at *www.usmission.ch/Press2006/CAT-MAY5-SPOKEN.pdf*.

b. Responses to further questions

On May 8, 2006, the U.S. delegation provided oral answers to Committee questions, available at *www.usmission.ch/Press2006/Press2006/CAT-May8.pdf*. Excerpts follow from responses by Mr. Bellinger and Tom Monheim, Associate Deputy Attorney General, U.S. Department of Justice (question 29). Questions specifically relating to detainees and related military issues are addressed in Chapter 18.A.4.b.(2).

* * * *

Questions 1 and 2 concern the memoranda drafted by the Department of Justice's Office of Legal Counsel in August 2002 and December 2004 that provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute that implements portions of the Convention. Nothing in these memos changes the definition of torture governing U.S. obligations under the Convention from what the United States accepted upon ratification of the Convention.

The Department of Justice's Office of Legal Counsel, which provides opinions on questions of law to the Executive Branch of the United States Government, produced the August 2002 and December 2004 memoranda. The August 2002 memorandum provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute and addressed issues concerning the separation of powers under the United States Constitution. That opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide U.S. government officials

The Office of Legal Counsel later withdrew that opinion and issued another opinion dated December 30, 2004, which is confined to an interpretation of the extraterritorial criminal torture statute. The December 2004 opinion supersedes the August 2002 opinion in its entirety and thus provides the Executive Branch's authoritative interpretation of the extraterritorial criminal torture statute.

The August 2002 opinion was withdrawn not because it purported to change the definition of torture but rather because it addressed questions that were not necessary to address. In this regard, the December 2004 Memorandum clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."

The purpose of both opinions was to provide legal advice related to a domestic criminal statute. Neither opinion purported to change the definition of torture set out in Article 1 as understood by the United States. The question that the OLC addressed was simply what the terms of that definition, as now reflected in the United States Code, mean.

Question 3 asks whether the references to "torture" as involving "extreme" acts in the December 2004 memorandum are compatible with the Convention. The fact that the Convention defines torture in Article 1 and then subsequently refers in Article 16 to "other acts of cruel, inhuman or degrading treatment or punishment" reflects the recognition of the negotiators that torture applied to more severe acts of cruelty and abuse than did cruel, inhuman or degrading treatment or punishment. This basic distinction between the severity of the conduct constituting torture, on the one hand, and cruel, inhuman and degrading treatment or punishment, on the other, is reflected in the underlying regime set forth in the treaty text to combat and prevent each form of conduct. Specifically because of the aggravated nature of torture, States Parties agreed to comprehensive measures to prohibit it under their criminal law, to prosecute perpetrators found in territory under

06-Cummins-Chap06.indd 410 10/22/07 11:40:25 PM

their jurisdiction, and not to return individuals to other States where there are substantial grounds for believing that such persons would be in danger of being subjected to torture. In contrast, the obligations regarding cruel, inhuman or degrading treatment or punishment are far more limited.

The December 2004 memorandum, recognizing what is clear from the text and structure of the Convention, distinguishes "torture" from "other acts of cruel, inhuman or degrading treatment or punishment" as expressed in Article 16, by explaining that torture is a more severe, or extreme, form of mistreatment than that described by Article 16. The use of the word "extreme" in these contexts clarifies the meaning of the word "severe" contained in the definition of torture set forth in Article 1.

The fact that the term "torture" is reserved for those acts involving more severe pain and suffering, as distinguished from cruel, inhuman or degrading treatment or punishment, is also confirmed by the Convention's negotiating history and is consistent with other international law sources, cited in our written submission.

Question 4 suggests that both OLC memoranda on the extraterritorial criminal torture statute are more restrictive than previous U.N. standards, including the 1975 Declaration. We respectfully disagree. The interpretation of the term "severe" in the December 2004 memorandum reflects the understanding that torture constitutes a more aggravated form of abuse than that covered by the "cruel, inhuman or degrading treatment or punishment" described in Article 16. As I have just explained, this distinction is not only express in the text of the Convention, but also is apparent from the negotiating history, the U.S. ratification record, and other international law sources. This distinction is also consistent with, and is not more restrictive than, the 1975 Declaration, which distinguishes torture from other lesser forms of abuse in part on the basis of the severity of the underlying acts.

Regarding Question 5 and how the United States ensures implementation of its Convention obligations, I would note that, before ratifying the Convention, the United States carefully reviewed U.S. federal and state laws for compliance with the treaty's terms. The United States concluded that, with the sole exception of prohibiting certain acts of torture committed outside the

territory of the United States, U.S. state and federal law covered all of the offenses stated in the Convention. The United States filled this lone shortcoming by enacting the aforementioned extraterritorial criminal torture statute.

In other words, the United States ensures compliance with its Convention obligations through operation and enforcement of its existing laws. As a result, there is no specific federal crime styled as "torture" for acts occurring within U.S. territory. The reason is simply that any act of torture falling within the Convention definition, as ratified by the United States, is already criminalized under U.S. federal and state laws. These laws, which meet the requirements of the Convention, are binding on government officials and are enforced through a variety of administrative procedures [and] criminal prosecutions. Additionally, civil suits provide available remedies in many cases. Our written response to this question provides a comprehensive list of such mechanisms.

There are various mechanisms that allow the United States to ensure its Convention obligations. Of these, the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), is particularly relevant to the Committee's question about monitoring of prisons as it enables the Department of Justice to eliminate a pattern or practice of abuse in any state prison, jail or detention facility. It is perhaps the most direct source of the federal government's authority to enforce the federal constitutional rights of persons in jails and prisons, including juvenile justice facilities, at the state and local level. Our written response provides more detailed information on the activities of the Department of Justice under this statute.

* * * *

Question 9 asks about derogations. I would like to state unequivocally that under U.S. law, there is no derogation from the express prohibition on torture. The legal and administrative measures undertaken by the United States to implement this prohibition are described in detail in both our *Initial Report* and *Second Periodic Report*.

* * * *

The United States provided a detailed answer to the Committee's questions in Question 13 about the process under which Article 3 is implemented in its written answers to the Committee. Rather than oversimplifying the various intricacies of procedure that may apply, I refer you to that discussion as well as the relevant discussion contained in the *Second Periodic Report*. To summarize briefly, however, let me make several points. Regulations in the immigration removal and extradition contexts permit aliens to assert Article 3 claims as a defense to either removal or extradition. Consistent with its obligations under Article 3, the United States does not transfer persons to countries where it determines that it is "more likely than not" that they would be tortured. Additionally, the United States' implementing laws and regulations do not exclude categories of persons from protection from refoulement under Article 3. The United States may not revoke or terminate an individual's protection under Article 3 from involuntary removal to a particular country so long as it continues to be shown that the protected individual would "more likely than not" be tortured in that country.

Our policy is clear. The United States does not transfer persons to countries where it believes it is more likely than not that they will be tortured. This policy applies to all components of the U.S. Government and to individuals in U.S. custody or control, regardless of where they may be detained. Nevertheless, on this point, I would like to refer you to our detailed analysis in our written response to this question. It explains that, despite this firm policy, as a legal matter, the view of the United States is that Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 applies to persons outside of U.S. territory.

In Question 14 the Committee asks whether the United States' understanding to Article 3 interpreting "substantial grounds for believing" is in fact a reservation that restricts or changes the scope of the provision. At the time the United States became a State Party to the Convention, it considered that the standard enunciated in its understanding was merely a clarification of the definitional scope of Article 3, rather than a statement that would exclude or

modify the legal effect of Article 3 as it applied to the United States. This view has not changed. With respect to the question of who is the competent authority to make Article 3 determinations, this turns on the context in which the determination is made. For example, as I mentioned in the previous question, the decision-maker will differ in immigration removal and extradition proceedings. To provide a thorough answer to this complex question, I would refer you to our more detailed description of the procedures governing these various contexts that is contained in our written submissions.

On Question 15, let me briefly describe the appeal rights of individuals asserting Article 3 claims in the immigration removal context. Generally speaking, in immigration removal proceedings (with the narrow exception of certain expedited proceedings described in our written response), an individual seeking protection from removal from the United States under Article 3 may appeal an adverse decision of the immigration judge to the Board of Immigration Appeals (BIA). If the BIA dismisses the individual's administrative appeal or denies his or her motion to reopen, the individual may file a petition for review of the BIA's decision with the appropriate federal court of appeals. I refer you to our written submissions for a more detailed description of these appeal procedures.

With respect to Question 16, as an initial matter, I would like to reiterate that the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary Rice recently explained that the United States and other countries have long used renditions to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. Rendition is a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. I would like to emphasize that the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States has not transported anyone, and will not transport anyone, to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks

assurances it considers to be credible that transferred persons will not be tortured.

Concerning Question 17, U.S. federal and state law prohibits unlawful acts that would constitute an enforced or involuntary disappearance, for example, by prohibiting assault, abduction, kidnapping, false imprisonment, and by regulating the release or detention of defendants.

With respect to transfers or removals of persons to another country, I would like to reiterate that the United States does not transfer persons to countries when it determines that it is more likely than not that they would be tortured.

Regarding the Committee's questions about diplomatic assurances in Question 18, I would like to emphasize, as the United States did in paragraph 33 of the *Second Periodic Report*, that diplomatic assurances are used sparingly. As an example, I would refer you to the over 2500 cases where Article 3 protection was granted to individuals in removal proceedings between 2000 and 2004. Procedures are in place that permit the United States, as appropriate, to seek assurances in order to be satisfied that it is not "more likely than not" that the individual in question would be tortured upon return. These procedures are described at length in our written submissions. Diplomatic assurances are not a substitute for a case-by-case determination of whether that standard is met.

If, taking into account all relevant information, including any assurances received, the United States believes that it is "more likely than not" that a person would be tortured if returned to a foreign country, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of diplomatic assurances, but declined to return individuals because the United States was not satisfied such an assurance would satisfy its obligations under Article 3.

In response to the Committee's question about the "rule of noninquiry," this is a judicial doctrine under which courts of the United States refrain from examining the penal systems of nations requesting extradition of fugitives when considering whether to permit extradition. Instead, such issues are considered by the Secretary of State in making the final extradition decision. The rule of noninquiry recognizes that, in the U.S. constitutional system,

the Executive branch is best equipped to evaluate and deal with such issues. The rule of noninquiry is regularly cited and relied upon in U.S. judicial opinions involving extradition.

In Question 19, the Committee refers to cases in which the United States has allegedly returned individuals to countries that the United States considers "not to respect human rights." In response, I would like to emphasize that Article 3 does not prohibit the return or transfer of individuals to countries with a poor human rights record *per se*, nor does it apply with respect to returns that might involve "ill treatment" that does not amount to torture. Rather, the United States implements its obligations under Article 3 through making an individualized determination as to whether a particular individual would "more likely than not" face torture in a particular country.

* * * *

In Question 20, the Committee asks whether torture constitutes a specific federal offense if it is committed within the United States. As I explained previously, while there is no specific federal crime styled as "torture" for acts occurring within U.S. territory, any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable. There is a long list of criminal violations that could be charged depending on the facts of the case: for example, aggravated assault or battery or mayhem in cases of physical injury; homicide, murder or manslaughter, when a killing results; kidnapping, false imprisonment or abduction where an unlawful detention is concerned; rape, sodomy, or molestation if those acts occur; an attempt or a conspiracy to commit any of the above acts; or a criminal violation of an individual's civil rights. Thus, there is no "lacuna" in U.S. law, as all acts that would constitute torture under the Convention are crimes in the United States.

Additionally, in our written response to Question 5, we described a range of mechanisms by which U.S. compliance with its Convention obligations is implemented. The availability of these mechanisms ensure that individuals are protected from torture and other serious forms of abuse, and that when violations arise,

06-Cummins-Chap06.indd 416 10/22/07 11:40:26 PM

prosecution at the federal and state level, and appropriate remedies are available.

To give one example that I think highlights just how broad the available tools for criminal prosecution under our system are: many acts which would qualify as "torture" could, provided the offender was acting under color of law, be prosecuted under Section 242 of Title 18 of the United States Code as criminal deprivations of Constitutional rights. As the examples in paragraphs 20 and 21 of the *Second Periodic Report* make clear, Section 242 also reaches, and the Department of Justice prosecutes as criminal deprivations of Constitutional rights, many violations that would constitute torture but also many that do not rise to that level.

The same is true of the military justice system, which is the focus of Question 21. As described in the Annex to the *Second Periodic Report*, it is a violation of our Uniform Code of Military Justice or "UCMJ," which applies worldwide, to engage in cruelty and maltreatment. Further, under the UCMJ, acts of assault, maiming, rape and carnal knowledge, manslaughter, murder, and unlawful detention, among other violations, can be prosecuted.

Under the UCMJ, individuals may also be charged for violations of U.S. federal criminal statutes, including the extraterritorial criminal torture statute and the other federal crimes I listed in response to Question 20.

Concerning Question 22, there is no "penal immunity" for any person for the crime of torture under U.S. law. Additionally, although there have been no criminal prosecutions initiated under the extraterritorial criminal torture statute to date, there have been prosecutions for offenses occurring outside the United States under other statutory provisions, including the Uniform Code of Military Justice.

* * * *

Regarding Question 29, the Department of Justice has continued its vigorous enforcement of [the Civil Rights of Institutionalized Persons Act ("CRIPA")].

* * * *

Question 29 also asks about investigations that ended in prosecution for torture or cruel, inhuman, degrading treatment or punishment. As noted in the *Second Periodic Report*, complaints about abuse, including physical injury by individual law enforcement officers, continue to be made and are investigated by the Department of Justice and, if the facts so warrant, prosecuted. The Department remains committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations where action by state or local authorities fails to vindicate the federal interest. Since October 1, 1999, 432 law enforcement officers have been convicted of violating federal civil rights statutes. Most of these officers were charged with using excessive force.

The Civil Rights Division also investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or the "pattern or practice" provision of the Violent Crime Control and Law Enforcement Act of 1994. These statutes allow the Department to bring legal actions for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement.

The Committee's question also concerned what measures have been taken to improve conditions of detention. In response, when the investigations of the Civil Rights Division uncover unconstitutional conditions at prisons, jails, or juvenile detention facilities, it takes measures including working with local and state authorities to remedy these conditions. The remedies, often memorialized in negotiated settlement agreements, represent constitutional solutions and recognized best national practices. Once the reforms are agreed upon with the facility, DOJ will often work cooperatively with the jurisdiction to jointly select a monitor to ensure implementation. The monitor will then work with the jurisdiction to promptly identify issues of noncompliance and provide status assessments regarding compliance to both the jurisdiction and DOJ.

In addition, in this regard, I would also like to emphasize the importance of the Civil Rights Division's impressive record of prosecuting officers who engaged in unlawful use of force. Prosecution enhances conditions of confinement by providing general

06-Cummins-Chap06.indd 418 10/22/07 11:40:27 PM

and specific deterrence to law enforcement officers, and ensuring persons in custody that laws prohibiting use of excessive force or other constitutional violations will be vigorously enforced.

* * * *

Regarding the Committee's question about the U.S. reservation to Article 16 in Question 43, let me begin first by explaining why the United States felt it necessary to take this reservation. Pursuant to the U.S. reservation, the United States agreed under Article 16 to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," "insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." As we have explained, this reservation was adopted because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" and was intended to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 16. Moreover, I would like to emphasize that while the United States recognizes that other courts in other countries, often dealing with different instruments than the Convention, have held that certain types of conduct satisfy standards similar to that in Article 16, the relevant test for the United States is the obligation it assumed as set forth in the U.S. reservation.

Because the meaning of Article 16's "cruel, inhuman or degrading treatment or punishment" standard is uncertain, it is difficult to state with certainty and precision what treatment or punishment (if any) would be prohibited by Article 16 with no reservation, but permitted under Article 16 as reserved by the United States. It is this very uncertainty that prompted the reservation in the first place.

In response to Question 44, and the Committee's question about the geographic scope of Article 16, as ratified by the United States, I would like to emphasize that by its terms, Article 16 of the Convention obliges States Parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading

treatment or punishment which do not amount to torture. . . ." (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of the "territory under [the] jurisdiction" of the United States. The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the *travaux* of the Convention indicating that the two are equivalent.

Notwithstanding debates over the territorial scope of Article 16, it is important to bear in mind that, as a matter of U.S. law, the Detainee Treatment Act of 2005 now provides that "[n]o individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment," as that term is defined by U.S. obligations under Article 16. Cruel, inhuman and degrading treatment or punishment is also prohibited under the Uniform Code of Military Justice, which governs U.S. military personnel wherever they may be located and prohibits abusive conduct.

Regarding the special maritime and territorial jurisdiction of the United States, I would direct you to our more detailed explanation contained in our written response to this question.

However, let me briefly make a few points. The territorial restriction in Article 16 of the Convention, which also appears in other provisions of the Convention, uses different terms to describe its coverage and serves a purpose entirely different from the technical term "special maritime and territorial jurisdiction," which Congress used to define the jurisdiction of certain U.S. criminal statutes. Article 16 is limited, by its own terms, to "territory under [the State Party's] jurisdiction." Moreover, "special maritime and territorial jurisdiction" includes concepts obviously inapposite to Article 16's reach, such as offenses committed on certain spacecraft and in "places outside the jurisdiction of any nation."

* * * *

Question 53 concerns implementation of the Convention in light of the federal structure of the United States. Under the U.S. Constitution, the federal government is a government of limited authority and responsibility. The resulting division of authority

means that state and local governments retain significant responsibility in many areas, including in areas relevant to certain aspects of the implementation of the Convention. Nonetheless, as a practical matter, this has not detracted from or limited our substantive obligations under the treaty because the U.S. Constitution prohibits such conduct by state and local government officials.

* * * *

Question 56 concerns the Optional Protocol to the Convention Against Torture. The United States is not considering ratification of this instrument.

* * * *

On May 12, 2006, the United States submitted responses to additional questions posed by the Committee Against Torture during the final session on May 8, 2006, available at *www.usmission.ch/Press2006/051206CAT.pdf*. The Committee Against Torture released its conclusions and recommendations on May 19, 2006, Doc. No. CAT/C/USA/CO/2, available under the heading Concluding Observations at *www.ohchr.org/english/bodies/cat/cats36.htm*. In a press briefing of the same date, Mr. Bellinger explained U.S. concerns with errors in the report, stating that "it appears that the report was written without the benefit of the . . . information that we gave them" and that the report "address[ed] issues that are well outside [the committee's] mandate and outside the scope of the Convention Against Torture." The press briefing is available at *www.usmission.ch/Press2006/0519BellingeronCAT.htm*. Excerpts from both the additional responses and the press briefing are provided in Chapter 18.A.4.b.(2).

3. Statement to Human Rights Council

On September 20, 2006, Ambassador Tichenor addressed reports of several special rapporteurs, including the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, stating that the United States "would note that there is an ongoing debate in the international

community related to a number of legal issues raised in [the rapporteur's] report. While we share his concern about the potential for misuse of diplomatic assurances, we cannot concur that states should be prohibited outright from resorting to credible assurances in appropriate cases." Ambassador Tichenor's remarks are available at *www.usmission.ch/Press2006/0920TichenorHRC.html*.

4. Indictment Under U.S. Antitorture Law

On December 6, 2006, Charles McArther Emmanuel (also known as Charles Taylor, Jr.), son of Charles G. Taylor, former president of Liberia, was indicted on two counts of torture and one count of using a firearm in a violent crime during interrogation of an opposition figure in Monrovia, Liberia. Emmanuel is a U.S. citizen. The indictment was the first under 18 U.S.C. § 2340A, which provides criminal penalties for "[w]hoever outside the United States commits or attempts to commit torture" and provides jurisdiction over such activity if "(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender." The extraterritorial criminal torture statute, 18 U.S.C. §§ 2340-2340B, was enacted as § 506 of the Pub. L. No. 103-236 in 1994 to implement U.S. obligations under the Convention Against Torture.

G. GENOCIDE, CRIMES AGAINST HUMANITY AND RELATED ISSUES

During 2006 President George W. Bush and other senior U.S. officials reiterated the U.S. conclusion concerning the commission of genocide in Darfur. *See also* Chapter 17.A.4.

In his address to the UN General Assembly on September 19, 2006, President Bush stated: "To the people of Darfur, you have suffered unspeakable violence. And my nation has called these atrocities what they are: genocide." 42 WEEKLY

COMP. PRES. DOC. 1633 (Sept. 25, 2006). On April 20, 2006, in welcoming remarks on the occasion of a visit by Chinese Premier Hu Jintao to the United States, the President announced: "[The United States and China] intend to deepen our cooperation in addressing threats to global security—including . . . the genocide in Darfur, Sudan. . . ." 42 WEEKLY COMP. PRES. DOC. 740 (April 24, 2006); *see also* 42 WEEKLY COMP.PRES. DOC. 2151 (Dec. 18, 2006).

In a statement to the UN Security Council on the adoption of Resolution 1706 on Sudan on August 31, 2006, Ambassador John Bolton, U.S. Permanent Representative to the United Nations, stated that "It is imperative that we move immediately to implement [Resolution 1706] fully to stop the tragic events unfolding in Darfur. Every day we delay only adds to the suffering of the Sudanese people and extends the genocide." Ambassador Bolton's statement is reproduced in full in Chapter 17.A.4 and is available at *www.un.int/usa/06_219.htm*.

In testimony before the House International Relations Committee on the budget for the Department of State for fiscal year 2007, February 16, 2006, Secretary of State Condoleezza Rice responded to a question from Congresswoman Barbara Lee concerning Darfur, stating: "On Darfur, our policy is unchanged. It is our view that genocide was committed and in fact continues in Darfur. And we are doing everything that we can to deal with the impact of . . . the situation in Darfur on the helpless people of Darfur, whether it's humanitarian work or trying to get a solution in Abuja to the crisis with the rebels, or trying to get a more active international security presence there through a U.N. security force." *International Affairs Budget Request for FY2007: Hearing before the House Comm. on International Relations*. 109th Cong. 6-59, 65-118 (2006) (statement of Condoleezza Rice, Secretary of State). *See also* press briefing by Jendayi Frazer, Assistant Secretary for African Affairs, "Stopping Genocide in Darfur: Ongoing U.S. Efforts and Working With the UN Security Council.," available at *www.state.gov/p/af/rls/rm/2006/71515.htm*.

H. DETENTIONS AND MISSING PERSONS

1. Disappearances

a. Draft convention on enforced disappearances

On December 20, 2006, the United States joined consensus on adoption of the text of the International Convention for the Protection of All Persons from Enforced Disappearance by the UN General Assembly. U.N. Doc. A/RES/61/177. The text of the convention is attached to the resolution.

On June 20, 2006, the United States had submitted a written statement for the record and for distribution to members and observers of the UN Human Rights Council on the draft convention. U.N. Doc. A/HRC/1/G/1 (June 27, 2006), available at *http://documents.un.org* and at *www.usmission.ch/Press2006/0627U.S.StatementonForcedDisappearances.html*. The statement welcomed the Working Group's "attention on this serious human rights violation [but] express[ed] disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group."

On November 13, 2006, at the time the convention was adopted in the Third Committee of the General Assembly, U.S. Advisor Mariano Ceinos-Cox stated that the United States "reaffirms and incorporates herein our statement presented to the Human Rights Council this past June. . . . [and] has requested that this intervention and statement before the Council be made part of the official record of the General Assembly in regard to the proposed convention." *See www.un.int/usa/06_332.htm. See also* document entitled "United States—Selected Core Legal Reservations to the Draft Forced Disappearances Instrument," containing some of the "proposed textual amendments proffered by the United States delegation during negotiations." The paper is available at *www.usmission.ch/ Press2006/0627LegalReservation.html*.

Excerpts below from the June statement explain U.S. concerns on specific points.

. . . The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. . . . We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report") [available at *http://documents.un.org*].

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right

to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

Third, the United States wishes to place on record our understanding of Article 43 of the draft Convention. We understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. We would hope that, per Article 27 of the draft Convention, States Parties adopt in the future use of the Human Rights Committee as the monitoring body.

In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia,* the following articles, which is an illustrative (not exhaustive) list:

- Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own.
- Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would "not create any additional obligations on States to

accede to particular instruments or amend their domestic legislation."

- Article 6(2) on the unavailability of a defense of obedience to superior orders in a prosecution related to enforced disappearance could under certain circumstances be inconsistent with due process guarantees and could subject unwitting government personnel to the possibility of prosecution for actions that they did not and could not know were prohibited. Therefore, as stated in paragraph 109 of the Report, the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance.
- Article 8 on statute of limitations presents problems of implementation in a federal system and contains unclear text in paragraph 2.
- Article 9(2) on "found in" jurisdiction remains unacceptable to the United States, especially in view of the lack of precision in the definition of enforced disappearance.
- Article 16 on *non-refoulement*, which refers to violations of international humanitarian law in the country of return, does not conform to international principles on *non-refoulement,* as articulated in the 1951 Refugee Convention.
- Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term "any persons with a legitimate interest" in Articles 17, 18, and 30 in accordance with the domestic law of a State.
- Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information.
- Article 22 on additional criminalization, among other concerns, should contain an express intentionality requirement, and the United States will interpret it to contain such an intent requirement (as noted above).

- Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a "victim," and may not be consistent with a common law system for granting remedies and compensation.
- Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.

* * * *

b. Working Group on Enforced and Involuntary Disappearances

In a statement to the HRC on September 19, 2006, Paula Barton, U.S. Mission Deputy Legal Adviser, commented on the issue of detentions in the report of the rapporteur of the Working Group on Enforced and Involuntary Disappearances as excerpted below. The full text of the statement is available at *www.usmission.ch/HRUpdates/0919EnforcedDisappearance.html.* For further discussion of renditions, *see* Chapter 3.A.4.

---

* * * *

. . . [A]ddressing specifically the report of the working group on Enforced Disappearance and its concerns on the issues of renditions:

- We recognize that the international community has not always agreed with the U.S position in the war on terror.
- However, renditions are used to transport terrorist suspects from the country where they were captured to another country where they can be questioned, held, or brought to justice. Renditions are not inherently unlawful. For decades, the United States and other countries have used renditions to transport terrorist suspects.
- U.S. personnel are required to treat all detainees consistent with U.S. law and treaty obligations, including prohibitions

on torture and cruel, inhuman, or degrading treatment, and against transferring persons to be tortured.

* * * *

2. Arbitrary Detention

On September 20, 2006, Ambassador Tichenor addressed the Human Rights Council on reports of special rapporteurs, including the rapporteur for the working group on arbitrary detention. The full text of Ambassador Tichenor's statement, excerpted below, is available at *www.usmission.ch/Press2006/0920TichenorHRC.html.* For further discussion of military detentions, *see* Chapter 18.A.4.

* * * *

. . . [T]he United States is pleased that the Working Group [on Arbitrary Detention] recognizes the need to provide states with the opportunity to redress alleged violations through domestic legal frameworks, prior to intervention by the Working Group. Such a prudential approach is particularly applicable to those countries, like the United States, that afford extensive due process protections.

The Report mentioned the case of five men who were arrested and convicted in U.S. Federal court for their involvement in a long-term and entrenched covert network in service to the Cuban Directorate of Intelligence. These five individuals – two U.S. nationals and three Cubans – were convicted of acting as agents of a foreign government, without required notice to the United States, following a jury trial. Three also were convicted of conspiracy to commit espionage, and the evidence showed persistent efforts over many years to penetrate U.S. military installations. The accused received full protection of the U.S. Constitution and laws, including defense counsel, investigators, and experts provided at U.S. government expense. After a trial lasting seven months, all five were convicted of serious offenses and given lengthy prison

sentences. The trial was open and its progress was widely reported in the press at the time.

On August 9, the U.S. Court of Appeals affirmed the convictions and the fairness of the trial. The court described the process whereby the jury was selected as a "model" for high-profile cases. Defendants will have the right to seek to appeal this decision to the Supreme Court. During their trial, the five defendants never denied their covert activities in service to the Government of Cuba. My government firmly believes that these five individuals were given and have exercised the extensive rights and protections afforded to all individuals under the U.S. criminal justice system.

The Report also mentioned the subject of secret prisons. . . . [O]n September 6 President Bush announced that 14 prisoners under U.S. control in the war against Al Qaeda have been transferred to the facility at Guantanamo Bay, where the ICRC will have access to them. The President then announced that with this transfer there are no detainees remaining in the CIA program. These individuals are extremely dangerous. They provided information on imminent terrorist attacks that saved innocent lives in the United States and elsewhere in the world.

* * * *

I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

The Alien Tort Statute ("ATS"), also often referred to as the Alien Tort Claims Act ("ATCA"), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It currently provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." Over the past several decades, the statute has been interpreted by the federal courts in various human rights cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations

and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA") was enacted in 1992 and is codified at 28 U.S.C. § 1350 note. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains a ten-year statute of limitations.

1. Alien Tort Statute

a. Sarei v. Rio Tinto

(1) Ninth Circuit decision

On August 7, 2006, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a lower court decision dismissing all claims in a case brought under the Alien Tort Statute based on allegations of human rights and other international law violations in Papua New Guinea. *Sarei v. Rio Tinto*, 456 F.3d 1069 (9th Cir. 2006). In response to a request from the U.S. District Court of the Central District of California, the United States had filed a letter on November 5, 2001, from William H. Taft, IV, Legal Adviser of the Department of State, stating, among other things, that

> The success of the [UN-sponsored] Bougainville peace process represents an important United States foreign policy objective as part of our effort at promoting regional peace and security. In our judgment, continued adjudication of the claims [in this case] would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations. . . .

See Digest 2001 at 337-39. In light of the Statement of Interest, the district court dismissed the plaintiffs' claims based on

the political question doctrine. *See Digest 2002* at 333-43 and 574-75. On that issue, the plaintiffs presented evidence on appeal that the PNG government's views regarding the suit had changed since 2001.

The Ninth Circuit concluded that the U.S. Statement of Interest "even when given serious weight, does not establish that any of the [factors established in *Baker v. Carr*, 369 U.S. 186 (1962)] is 'inextricable from the case'" and thus did not provide the basis for dismissal on political question grounds. The court also found that it would not be appropriate to recognize an exhaustion requirement in the ATCA, as excerpted below. *See also* Chapter 15.C.1.a.(2) for discussion of the issue of comity.*

. . . Plaintiffs are current or former residents of Bougainville, Papua New Guinea ("PNG"), who allege that they or their family members were the victims of numerous violations of international law as a result of defendant mining corporation Rio Tinto, PLC's ("Rio Tinto") Bougainville mining operations and the 10-year civil conflict that followed an [u]prising at the Rio Tinto mine. . . .

Although several different doctrines of justiciability are at issue here—the political question doctrine, the act of state doctrine and the doctrine of international comity—all in effect provide different ways of asking one central question: are United States courts the appropriate forum for resolving the plaintiffs' claims? The answer to this question turns in part on the weight to be given to a statement of interest submitted by the United States Department of State ("State Department") asserting that continuation of the lawsuit "would risk a potentially serious adverse impact . . . on the conduct of [United States] foreign relations." Rio Tinto's cross-appeal

* As this volume of the *Digest* was going to press, on April 12, 2007, the Ninth Circuit withdrew its 2006 opinion, *2007 U.S. App. LEXIS 8387 (9th Cir. 2007*), and issued a new opinion. *2007 U.S. App. LEXIS 8430 (9th Cir. 2007).* The new opinion differs in its treatment of whether the sufficiency of the cause of action may be considered at the jurisdictional stage (see below), but discussion of political question, comity and exhaustion of local remedies under the ATS was unchanged. Relevant aspects of the 2007 opinion and any subsequent developments will be discussed in *Digest 2007*.

06-Cummins-Chap06.indd 432 10/22/07 11:40:28 PM

also argues that the ATCA requires exhaustion of local remedies—yet another way of questioning whether there is a different and more appropriate forum to develop and try these claims.

We conclude that most of the plaintiffs' claims may be tried in the United States. We hold that the district court erred in dismissing all of the plaintiffs' claims as presenting nonjusticiable political questions, and in dismissing the plaintiffs' racial discrimination claim under the act of state doctrine. We also vacate for reconsideration the district court's dismissal of the plaintiffs' United Nations Convention on the Law of the Sea ("UNCLOS") claim under the act of state doctrine, and its dismissal of the racial discrimination and UNCLOS claims under the international comity doctrine. Although Rio Tinto and *amicus curiae* have asserted several plausible rationales in support of an exhaustion requirement, we affirm the district court's conclusion that no such requirement presently exists, and leave it to Congress or the Supreme Court to alter the status quo if warranted.

* * * *

E. It Would Not Be Appropriate At this Time to Recognize an Exhaustion Requirement in the ATCA

The Supreme Court in *Sosa* hinted that it might be amenable to recognizing an exhaustion requirement as implicit in the ATCA:

> This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

Sosa, 542 U.S. at 733 n.21 (internal citations omitted).

Neither the Supreme Court nor any circuit court, however, has resolved the issue of whether the ATCA requires exhaustion of local remedies. This circuit has sustained the justiciability of ATCA claims, both before and after *Sosa*, without requiring exhaustion. *See Alperin v. Vatican Bank*, 410 F.3d 532, 544-58 (9th Cir. 2005); *In re Estate of Ferdinand Marcos, Human Rights Litig.,* 25 F.3d 1467, 1474-76 (9th Cir. 1994). . . .

* * * *

The central argument Rio Tinto, *amicus curiae* and the dissent advance to justify exercising judicial discretion [to require exhaustion] is that exhaustion of local remedies is an established aspect of international law. . . . Consequently, the "law of nations" language in the ATCA allegedly provides courts with the discretion to import an international law doctrine of exhaustion into an ATCA claim along with the substantive cause of action.

Moreover, the argument goes, not only would requiring exhaustion be consonant with international law, but such a requirement would address many of the policy concerns identified by the district court in its decision to dismiss some (or all) claims on political question, act of state and comity grounds. Finally, exhausting local remedies assumedly would encourage the development of effective local criminal and civil penalties for human rights violations.

However, this is a patchwork argument that on closer analysis is less cohesive and unambiguous than it is made out to be, as the following examples illustrate. First, the international law of exhaustion does not *compel* a U.S. court to apply it in an ATCA cause of action. Exhaustion, to the extent it may be a norm within international human rights law, was developed specifically in the context of international tribunals—such as the Human Rights Committee or the Inter-American Court of Human Rights—which were created through treaties and with the consent of sovereign countries. Even before exhaustion was written into human rights treaties, the norm evolved in the context of international fora and was based on assertions of national sovereignty. *See* Chittharanjan Felix Amerasinghe, Local Remedies in International Law 62 (2d ed. 2004). . . .

Thus, the international norm of exhaustion does not speak to the hybrid situation before us where a domestic court in a sovereign

06-Cummins-Chap06.indd 434 10/22/07 11:40:29 PM

country, rather than an international tribunal, is charged with adjudicating violations of customary international law through the vehicle of a civil suit. Although consideration of other countries' sovereignty is relevant to our inquiry here as it was in our earlier consideration of act of state doctrine and international comity, the exhaustion limitation imposed on and accepted by *international* tribunals as a requirement of international law is not dispositive as to a United States court's discretion to impose exhaustion as part of the ATCA.

Second, the theory that the "law of nations" language in the ATCA provides a means by which the international law of exhaustion may be applied domestically overlooks that international exhaustion is procedural rather than substantive. . . .

The substance-procedure distinction is important in this case because *Sosa* held that the ATCA "is a jurisdictional statute creating no new causes of action . . . [and was] enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. None of the substantive definitions of international law violations in modern human rights treaties contain exhaustion as an element of such violations. . . .

* * * *

Third, the argument that requiring exhaustion will improve compliance with international human rights law in other countries because it provides an incentive for those countries to improve their legal systems appears plausible on its face. . . [but] remains fairly speculative and most often lacks any empirical data showing improvements in the quality or accessibility of local remedies as a result of the application of the local remedies rule at the international level. . . .

Finally, and most importantly, . . . [a]bsent any clear congressional guidance on importing a blanket exhaustion requirement into the ATCA, *Sosa* counsels against doing so by judicial fiat—especially when Congress has not seen fit to do so when it had the opportunity.

* * * *

The Ninth Circuit also addressed the validity of the plaintiffs' claims, agreeing with the district court's conclusion that

> claims for war crimes, violations of the laws of war, racial discrimination and for violations of the [UN Convention on the Law of the Sea ("UNCLOS")] all implicate "specific, universal and obligatory norm[s] of international law" that properly form the basis for ATCA claims . . . , and that Sosa's gloss on this standard does not undermine the district court's reasoning. All of the plaintiffs' remaining claims, with the exception of the UNCLOS claim, assert jus cogens violations that form the least controversial core of modern day ATCA jurisdiction. . . .

The court's 2006 opinion also concluded that, "post-*Sosa*, claims for *vicarious liability* for violations of *jus cogens* norms are actionable under the ATCA." (emphasis in the original).

In its April 12, 2007, opinion, noted above, the Ninth Circuit concluded that "we need not and do not decide whether plaintiffs' substantive claims and theories of vicarious liability constitute valid ATCA claims after *Sosa*." *2007 U.S. App. LEXIS 8430 (9th Cir. 2007)*. Excerpts from the U.S. *amicus* brief urging this result follow in (2) below.

(2) U.S. amicus brief in support of petition for rehearing

On September 28, 2006, the United States filed a brief as *amicus curiae* in support of Rio Tinto's request for panel rehearing or rehearing *en banc* of the Ninth Circuit decision.

The brief noted that this is "the first case since *Sosa* in which this Court has considered the types of claims that may be asserted as a matter of federal common law under the ATS" and "explain[ed] that the panel should not have reached out to decide the validity of plaintiffs' claims." As noted in the excerpts that follow, *Sosa* in fact reversed a previous decision by the Ninth Circuit (citations to the slip opinion and some footnotes omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

B. The Majority Fundamentally Misconstrued *Sosa* as Affirming this Court's Prior Standard for Recognizing Claims under the ATS.

* * * *

In this case, the panel majority held that, in *Sosa*, the Supreme Court had "ratified" the Ninth Circuit's prior standard, under which a claim is cognizable under the ATS so long as it implicates "specific, universal and obligatory norms of international law." But *Sosa* represents a significant departure from this Court's previous ATS jurisprudence. The foregoing discussion makes clear that the Supreme Court did not "ratify" this Court's prior standard. Rather, *Sosa* calls for a significantly more searching and cautious inquiry, requiring courts to evaluate both the sources of law relied upon to establish the obligatory nature of an asserted norm, and the specificity of the norm itself, including consideration of the practical consequences of recognizing the norm as the basis for a cause of action. As we next explain, neither the majority nor the district court undertook the cautious evaluation mandated by *Sosa*.

C. The Majority's Evaluation of Plaintiffs' Claims Does Not Comply with *Sosa*'s Requirements.

Having concluded that *Sosa* had ratified this Court's standard for recognizing ATS claims, the majority endorsed the district court's analysis of plaintiffs' claims. However, neither the district court (which ruled prior to *Sosa*) nor the majority considered whether the ATS applies to purely extraterritorial claims such as those asserted here. *See Sosa*, 542 U.S. at 714–17, 727–28. Nor did either court consider whether the sources of law plaintiffs relied on "establish the relevant and applicable rule of international law," in the sense *Sosa* requires. *Sosa*, 542 U.S. at 735. And neither considered whether those norms are "defined with a specificity comparable to the features of the 18th-century paradigms." *Id*. at 725.

1. The ATS Does Not Apply to the Extraterritorial Claims in this Case.

In evaluating plaintiffs' claims post-*Sosa*, this Court was required to address a serious concern raised by the Supreme Court: whether

federal courts could properly project federal common law extraterritorially to resolve disputes centered in foreign countries. *See Sosa*, 542 U.S. at 727–28 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold a foreign government or its agent has transgressed those limits.*** Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise the risk of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

The answer to that question should be "no." As we explain below (and as we have argued in two pending appeals in this court),[1] Congress enacted the ATS to provide a mechanism through which certain private insults to foreign sovereigns could be remedied in federal courts. In the late 18th-century, the law of nations included "rules binding individuals for the benefit of other individuals," the violation of which "impinged upon the sovereignty of the foreign nation." *Sosa*, 542 U.S. at 715. Such violations, "if not adequately redressed[,] could rise to an issue of war." *Ibid*. Violations of safe conducts, infringement of the rights of ambassadors, and piracy came within this "narrow set." *Ibid*. But under the Articles of Confederation, "[t]he Continental Congress was hamstrung by its inability to cause infractions of treaties, or the law of nations to be punished." *Id*. at 716 (quotation marks omitted).

The Continental Congress recommended that state legislatures authorize suits "for damages by the party injured, and for the compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Ibid*. (quotation marks omitted). Most states failed to respond to the Congress' entreaty. Physical assaults on foreign ambassadors in the United

[1] *See* the United States' amicus curiae briefs in *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.), and in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.). [Editor's note: *Mujica* is discussed in 1.b. below; both amicus briefs are available at *www.state.gov/s/l/c8183.htm*.]

06-Cummins-Chap06.indd 438 10/22/07 11:40:29 PM

States, and the absence of a federal forum for redress of the ambassadors' claims, led to significant diplomatic protest. *Id*. at 716–17. After ratification of the Constitution, the First Congress adopted the ATS to remedy this lacuna, thereby reducing the potential for international friction. *Id*. at 717–18.

This history shows that Congress enacted the ATS to provide a forum for adjudicating alleged violations of the law of nations occurring within the territory or jurisdiction of the United States. There is no indication that Congress intended the ATS to apply to purely extraterritorial claims, especially to disputes that center on a foreign government's treatment of its own citizens in its own territory. Indeed, the recognition of such claims would directly conflict with Congress' purpose in enacting the ATS, which was to reduce diplomatic conflicts.

Since the early years of the Republic, there has been a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quotation marks omitted). The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Ibid*. Thus, "unless there is the affirmative intention of the Congress clearly expressed," in "the language [of] the relevant Act," the Court will presume that a statute does not apply to actions arising abroad. *Ibid*. (quotation and alteration marks omitted).

The ATS does not "clearly express[]" Congress' intent to authorize the courts to project common law claims to conduct occurring entirely outside the jurisdiction of the United States. Indeed, the evidence is to the contrary. The same Congress that enacted the ATS enacted a statute criminalizing piracy, assaults on ambassadors, and violations of safe conduct—the three historic paradigm violations of the law of nations identified by *Sosa*. 1 Stat. 112, §§ 8, 25 (April 30, 1790). That statute was written in general terms and contained no geographic limitation. But in a case involving acts of piracy committed by foreigners within the jurisdiction of a foreign sovereign, the Supreme Court held that the statute did not apply. *United States v. Palmer*, 16 U.S. 610, 630–34 (1818). Noting that the statute was entitled "'an act for

the punishment of certain crimes against the United States,'" the Supreme Court explained that Congress intended to punish "offences against the United States, not offences against the human race." *Palmer*, 16 U.S. at 632. It is highly unlikely that the same Congress, in enacting the ATS, meant to authorize an extension of federal common law to regulate conduct by foreigners in a foreign country, which would go well beyond conduct Congress sought to reach in the criminal statute.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian Am. Oil*, 499 U.S. at 248. That danger is especially grave in suits under the ATS, where a court's projection of federal common law abroad can interfere with a foreign sovereign's choice about how to resolve conflicts within its jurisdiction. Thus, for example, in the apartheid litigation, plaintiffs seek to hold multinational corporations that did business with South Africa liable for the harms committed by the apartheid regime, despite the fact that the litigation is inconsistent with South Africa's own reconciliation efforts. *See In re S. African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Similarly, the peace agreement ending the ten-year Bougainville conflict contains its own reconciliation provisions and provides immunity for certain conflict-related behavior.[3] Constitution of

[3] At the request of the district court, in November 2001, the Government filed a statement of interest, presenting the State Department's views about the effect this litigation would have on the Bougainville peace process and the conduct of the United States' foreign relations. That statement was based on the State Department's assessment of the Government's foreign relations interests and the peace process and as they existed in 2001, which are different from the interests and circumstances that exist today. In any event, the statement did not recommend a specific disposition of any of the legal issues presented, and the United States is not here seeking dismissal of the litigation based on purely case-specific foreign policy concerns. *Sosa*, 542 U.S. at 733 n.21.

Nevertheless, as discussed above, we continue to believe that, because of the interference they entail in the affairs of foreign governments, ATS suits such as this carry a significant risk to the foreign policy interests of the United States and that, in light of the cautionary instructions of the Supreme Court in *Sosa*, federal courts should not fashion a cause of action based on the plaintiffs' claims in this case, especially since the conduct alleged occurred in a foreign country and involves a foreign government's treatment of its own citizens.

06-Cummins-Chap06.indd 440 10/22/07 11:40:30 PM

the Autonomous Region of Bougainville, § 187(1), *available at* http://www.paclii.-org/pg/legis/consol_act/ac185/ (reconciliation); *id*. sched. 6.1, *available at* http://www.-paclii.org/pg/legis/consol_act/acs272/ (immunity). A court in the United States is not well-positioned to evaluate what effect adjudication of claims such as those asserted here may have on a foreign sovereign's efforts to resolve conflicts. It is precisely to avoid "unintended clashes" with such efforts that the Supreme Court requires Congress to speak clearly when it intends for legislation to apply extraterritorially. Congress has not done so in the ATS. Accordingly, claims under the ATS should be recognized only if they arise within the ordinary jurisdiction of the United States.

Plaintiffs' claims here involve actions committed entirely outside the United States' jurisdiction and require a court to review a foreign government's treatment of its own citizens. Such claims are not cognizable under the ATS.[4] In any event, the district court and the majority erred in upholding the validity of plaintiffs' claims without considering whether purely extraterritorial claims of this sort can be brought under the ATS.

2. The Majority Did Not Properly Consider Whether the Sources of Law on which Plaintiffs Rely Can Support an ATS Claim.

The majority erred in its approach to deciding how ATS claims should be recognized as a matter of federal common law. The Supreme Court in *Sosa* warned courts to be cautious in recognizing "new and debatable violations of the law of nations" as actionable in United States courts. *Sosa*, 542 U.S. at 727. In particular, the Supreme Court rejected this Court's reliance on non-self-executing treaties as "establish[ing] the relevant and applicable rule of international law." *Id*. at 735. Without mentioning that aspect of *Sosa*,

[4] At the very least, no such cause of action should be recognized in the absence of extraordinary circumstances, such as where there is no functioning government and the political branches have determined that it would be appropriate to apply United States law (incorporating international law).

* * * *

the majority here returned to the repudiated practice of reliance on non-self-executing treaties as the basis for ATS claims.

Plaintiffs assert claims for crimes against humanity, violations of the laws of war, racial discrimination, and violations of the United Nations Convention on the Law of the Sea (UNCLOS), 21 I.L.M. 1261–1354 (1982). The panel majority held that, with the exception of the UNCLOS claims, plaintiffs' claims are cognizable under the ATS because they implicate *jus cogens* norms. But this Court has recognized that "[t]he development of an elite category of human rights norms is of relatively recent origin in international law, and although the concept of jus cogens is now accepted, its content is not agreed." *Alvarez-Machain*, 331 F.3d at 614 (quotation and alteration marks omitted). For that reason, it is critical that courts not simply rely on the description of a norm as *jus cogens*, but carefully consider the source of law supporting the cause of action.

Here, for example, plaintiffs rely on the prohibition against genocide contained in the Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 7, 1948, 78 U.N.T.S. 277), and on prohibitions contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984, 1465 U.N.T.S. 85) to support their claim for crimes against humanity. *See, e.g.,* First Amend. Compl. ¶¶ 213, 214. As with the International Covenant on Civil and Political Rights, discussed in *Sosa*, the United States ratified those conventions on the understanding that neither is self-executing.[6] *See* 132 Cong. Rec. S1362 (Feb. 19, 1986)(conditioning ratification of Genocide Convention on enactment of implementing legislation); 136 Cong. Rec. S17486-01, S17492 (Oct. 27, 1990) (ratifying Torture Convention; declaring arts. 1-16 not self-executing). Thus, these conventions cannot by "themselves establish the relevant and applicable rule of international law" for an ATS claim. *Sosa*, 542 U.S. at 735.

In addition, when considering whether a treaty provision can support a claim under the ATS, courts must consider Congress' intent, as expressed in implementing legislation. Thus, for example,

[6] Plaintiffs similarly rely on non-self-executing treaties for their war crimes and racial discrimination claims.

Congress implemented the Genocide Convention by making genocide a crime, punishable by death or life imprisonment. 18 U.S.C. § 1091(a), (b). But in that same legislation, Congress expressly stated that nothing "in this chapter [shall] be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. § 1092. Thus, courts must carefully examine whether Congress has considered and foreclosed private rights of action for civil claims based on the Genocide Convention, before recognizing such claims under the ATS. A similar inquiry is necessary when plaintiffs rely in an ATS case on any treaty for which there is implementing legislation. *See, e.g.*, *Enahoro v. Abubakar*, 408 F.3d 877, 883–86 (7th Cir. 2005) (considering implementing legislation for the Torture Convention in ATS case asserting a claim of torture).

3. The Majority Did Not Consider Whether the Norms on Which Plaintiffs Rely Are of the Type, or Are Defined with the Specificity, Required by *Sosa*.

Even when plaintiffs have identified a source of law that might provide a basis for a claim under the ATS, courts must consider whether the international norm is of the appropriate type and whether the norm "is sufficiently definite to support a cause of action" in a federal court. *Sosa*, 542 U.S. at 732.

Sosa identified three historical examples of the kinds of international law norms to which Congress intended the ATS to apply, each of which was a "rule[] binding individuals for the benefit of other individuals." 542 U.S. at 715. "It was this narrow set of violations of the law of nations*** that was probably on the minds of the men who drafted the ATS with its reference to tort." *Ibid.* The panel, however, failed to consider whether the ATS should be expanded beyond the three paradigmatic examples to encompass norms of international law that can *only* be violated by action under color of law. *Cf. id.* at 732 n.20 (noting lower court opinions analyzing the question whether genocide or torture by private actors violates international law).

At the very least, when the defendant in an ATS case is "a private actor such as a corporation or individual," the specificity inquiry

involves consideration of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Ibid*. It further involves consideration of whether the content of the norm, i.e., the standard to be applied in evaluating the alleged cond[uc]t, is well-defined. What the Supreme Court endorsed in *Sosa* were paradigmatic norms of a specific, definite character not requiring the exercise of judicial discretion for their determination. Federal courts are not to give content incrementally to otherwise imprecise legal concepts under the ATS. *See, e.g.*, *Sosa*, 542 U.S. at 713, 728. Neither the district court nor the majority considered whether the norms plaintiffs identified have the requisite specificity.

Thus, for example, the majority held that plaintiffs may state claims under two provisions of the UNCLOS because it is a "codif[ication] of customary international law that can provide the basis of an [ATS] claim." One of the provisions imposes obligations on state parties to take "all measures*** necessary to prevent, reduce and control pollution of the marine environment." UNCLOS, art. 194. That provision leaves to state parties the significant discretion in how to implement that provision, directing states to take "the best practicable means at their disposal." *Ibid*. The other requires states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources." *Id*. art. 207; *see Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002) (discussing UNCLOS claims). The parameters of these requirements are not clear, and the provisions are not defined with the specificity *Sosa* requires.

It is difficult to discern a standard by which a federal court could determine that a state has failed to take "all measures*** necessary" to prevent marine pollution. It is even more difficult to fathom how a federal court could adjudicate a claim that a state has failed to adopt appropriate environmental legislation, without sitting in judgment of the sovereign acts of a foreign nation. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700–701 (2004) (discussing act of state doctrine). Even more problematic, neither the district court nor the majority considered whether UNCLOS "extends the scope of liability" for a *state*'s violation of its treaty

obligations to "a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20.

Similarly, the majority held that plaintiffs' claim of "'systematic racial discrimination' and 'policies of racial discrimination' in Rio Tinto's operation of the mine" were cognizable under the ATS because allegations of racial discrimination "constitute jus cogens violations." Slip Op. 8963; *see id*. at 8949. But whether or not "systematic racial discrimination" is a violation of a *jus cogens* norm, the norm is limited to state action. "A *state* violates international law if, as a matter of state policy, it practices, encourages, or condones*** systematic racial discrimination." *Kadic v. Kradžić*, 70 F.3d 232, 240 (2d Cir. 1995) (emphasis added) (quotation marks omitted). We are aware of no international law norm encompassing racial discrimination by a private actor.

It would be remarkable if a federal court were to recognize claims of private racial discrimination as cognizable under the ATS, in light of the Supreme Court's admonition that courts should consider "the practical consequences of making [a] cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732–33. It was practical consequences that led the Court to reject Alvarez' arbitrary arrest claim, because "[h]is rule would support a cause of action in federal court for any [unauthorized] arrest, anywhere in the world." *Id*. at 736. It would be similarly problematic for federal courts to recognize claims of private racial discrimination, "anywhere in the world."

4. Vicarious Liability Should Not Be Recognized Absent Authorization By Congress.

Plaintiffs' war crimes and crimes against humanity claims are based principally on acts allegedly committed by the Papua New Guinea army. Plaintiffs seek to hold Rio Tinto vicariously liable for those harms. The majority quite properly asked "whether, post-*Sosa*, claims for *vicarious* liability" are available under the ATS. Slip Op. 8950. Without distinguishing among the various types of secondary liability, the majority concluded that vicarious liability claims are available, because courts draw on federal common

law in adjudicating ATS claims, and vicarious liability is recognized under federal common law. *Ibid*.

But in light of the many warnings the Supreme Court gave about the need for courts to exercise "restrained" discretion in recognizing new federal common law claims under the ATS, the institutional disadvantages courts have in constructing new theories of liability, and the effect ATS claims can have on the Nation's foreign relations, it is most doubtful that the Supreme Court would approve of the importation into the ATS context of federal common law theories of vicarious liability, which federal courts developed to "effectuate" the policies underlying substantive federal statutes. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957). Instead, the relevant inquiry is Congress' intent in enacting the ATS.

In *Sosa*, the Supreme Court explained that Congress enacted the ATS in order to confer jurisdiction in the district courts over a "very limited" class of claims, defined by international law. *Sosa*, 542 U.S. at 712. Congress did not intend to give courts the "power to mold substantive law." *Id*. at 713. Vicarious liability is a form of "secondary liability" in persons other than those who have caused the harm. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). The Supreme Court has held that judicial imposition of "aiding and abetting" liability (another form of secondary liability) under federal civil statutes that do not expressly provide for such liability would be a "vast expansion of federal law." *Id*. at 183. For that reason, the Supreme Court declined to recognize aiding and abetting liability in the civil context absent a "congressional direction to do so." *Ibid*. Accordingly, we have recently argued in this Court and others that it would be inappropriate for courts to recognize aiding and abetting liability under the ATS without a congressional directive. *See* Brief of the United States as Amicus Curiae in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.) (pending); *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.) (pending); *In re S. African Apartheid Litigation*, No. 05-2326 (2d Cir.) (pending).

Aiding and abetting and vicarious liability are distinct forms of secondary liability. *See, e.g., State Farm Fire & Cas. Co. v. Bomke*, 849 F.2d 1218, 1220 (9th Cir. 1988). Nevertheless, recognition of

any form of secondary liability under the ATS would represent "a vast expansion" of the type of liability historically available under the ATS. We are aware of no authority recognizing secondary civil liability under the ATS even for the paradigm violations: "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 715; *cf. In re S. African Apartheid Litigation*, 346 F. Supp. 2d at 554 (declining to recognize aiding and abetting liability under the ATS because such a rule "would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court mandated for the lower federal courts").

The majority relied on a 1795 opinion of Attorney General William Bradford to support its conclusion that "violations of the law of nations have always encompassed vicarious liability." Slip Op. 8950 n.5. But that opinion does not support the majority's conclusion. It states that "all those who should render themselves *liable to punishment* under the laws of nations, by committing, aiding, or abetting hostilities against [foreign states at peace with the United States], would not receive the protection of the United States *against such punishment*." 1 Op. Att'y Gen. 57, 59 (1795) (emphasis added). As the Supreme Court explained, at the time the ATS was enacted, the law of nations encompassed certain criminal offenses that could be prosecuted in a state's domestic courts. *See Sosa*, 542 U.S. at 715 (discussing "offenses against the law of nations addressed by the criminal law of England"). The Bradford opinion is principally concerned with the availability of United States courts for the prosecution of such crimes. *See, e.g.*, 1 Op. Att'y Gen. at 58 (discussing whether the acts are "offenses against the United States*** punishable by indictment in the district or circuit courts").

At most, then, Attorney General Bradford's opinion suggests that those who aid and abet hostilities against foreign nations with whom we are at peace may be liable for punishment under *criminal law*. *See Cent. Bank of Denver,* 511 U.S. at 181 ("Aiding and abetting is an ancient criminal law doctrine."). But, as we have noted, the Supreme Court has expressly refused to recognize aiding and abetting liability under civil law, based on its existence in criminal law. *See id.* at 183. Thus, Attorney General Bradford's

opinion provides no support for the proposition that federal common law tort claims under the ATS "have always encompassed" secondary liability.

The Bradford opinion does say that those injured by the hostile acts of United States citizens on the high seas, in violation of the law of nations, "have a remedy by a *civil* suit" under the ATS. 1 Op. Att'y Gen. at 59. But the American citizens whose actions prompted the Attorney General's opinion were alleged to have "voluntarily joined, conducted, aided, and abetted" the hostile acts. *Id*. at 58. Because direct action was alleged, in addition to aiding and abetting, the opinion does not clearly suggest that aiding and abetting liability is cognizable under the ATS.

In the absence of an international law norm of secondary civil liability with a "definite content and acceptance among civilized nations" comparable to that of the 18th-century paradigms, courts should wait for "congressional direction" before recognizing vicarious liability under the ATS. *Cent. Bank of Denver,* 511 U.S. at 181.

II. THE MAJORITY ERRED IN HOLDING THAT EXHAUSTION OF FOREIGN REMEDIES IS NEVER REQUIRED FOR ATS CLAIMS ARISING ABROAD.

The majority erroneously concluded that, because Congress had not specifically mandated exhaustion of foreign remedies, where a claim asserted under the ATS arises abroad, a court should not itself impose such a requirement. In so holding, the majority relied on the Supreme Court's admonition in *Sosa* to exercise "judicial caution." *Id*. at 8981. As an initial matter, it was plain error to read *Sosa* as somehow counseling against the adoption of an exhaustion requirement. To the contrary, the Supreme Court expressly stated that it "would certainly consider this [exhaustion] requirement in an appropriate case." 542 U.S. at 733 n.21.

* * * *

As a matter of international comity, "United States courts ordinarily*** defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement

does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). Such international comity seeks to maintain our relations with foreign governments, by discouraging a United States court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895). To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve t[he] dispute, is the opposite of the model of "judicial caution" and restraint contemplated by *Sosa*. As noted above, in *Sosa*, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 728. If a court is ever to do so, it is important that it show due respect to competent tribunals abroad and mandate exhaustion where appropriate.

Moreover, an exhaustion requirement is fully consistent with Congress' intent in enacting the ATS. As discussed above, the whole point of the ATS was to *avoid* international friction. The ATS was enacted to ensure that the National Government would be able to afford a forum for punishment or redress of violations for which a nation offended by conduct against it or its nationals might hold the offending party accountable. As we have explained, against this backdrop, reinforced by cautions recently mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law power to adjudicate a foreign government's treatment of its own nationals. But even assuming that such claims are cognizable under the ATS, an exhaustion requirement would further Congress' intent to minimize the possibility of diplomatic friction by affording foreign states the first opportunity to adjudicate claims arising within their jurisdictions.

Consistent with that result, it is notable that, when Congress has clearly created a private right for claims that may arise in foreign jurisdictions, it has required exhaustion as a prerequisite to

suit. *See, e.g.*, Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, § 2(b), *reproduced at* 28 U.S.C. § 1350 note. And Congress adopted this requirement in the TVPA, in part, because it viewed exhaustion as a as a procedural requirement of international human rights tribunals, as the dissent notes.

* * * *

b. Mujica v. Occidental Petroleum Corporation

As noted in the U.S. brief in *Sarei supra,* the United States also filed a brief as *amicus curiae* in the Ninth Circuit in support of affirmance in the appeal of *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005). In that case, the district court granted a motion to dismiss claims under the Alien Tort Statute as barred by the political question doctrine and found state claims also barred for foreign affairs reasons. *See Digest 2005* at 418-24 and *Digest 2004* at 376-80. In its *amicus* brief, the United States agreed with the district court's holdings but also argued that

> in this case, . . . it is not necessary for this Court to address the district court's holding that the plaintiffs' claims are barred by the political question doctrine, because the particular foreign policy interests identified by the United States' Supplemental Statement of Interest warrant dismissal of the litigation under the doctrine of international comity.

The comity issues in this case are discussed in Chapter 15.C.1.a.(1).

The brief argued further that "plaintiffs' Section 1350 [ATS] claims fail to meet the stringent standards for federal common-law claims and their state-law claims are barred under Colombian law." Excerpts below address only issues different from those discussed in *Sarei. Mujica* was pending at the end of 2006 in the Ninth Circuit.

* * * *

The plaintiffs' claims, although brought against private corporations rather than the Colombian government itself, attack the conduct of the Colombian Air Force. . . .

* * * *

The district court permitted most of the plaintiffs' Section 1350 claims to go forward based on the misconception that the only relevant policy concerns were "(1) the extent to which recognizing an ATS claim would allow foreign plaintiffs to pursue claims in U.S. courts; and (2) the extent to which recognizing an ATS claim would unnecessarily duplicate remedies provided through other federal laws." E.R. 673. In *Sosa*, however, the Supreme Court explained that the inquiry whether to entertain a claim as a matter of federal common law is intended to set a "high bar," with a court required to consider the "practical consequences" and "potential implications for [U.S.] foreign relations" of recognizing a claim. 542 U.S. at 727, 732. The Court also suggested that "case-specific deference to the political branches" might be appropriate based on the Executive Branch's view of our foreign policy interests. *Id.* at 733 n.21. Where the plaintiffs' claims implicate the United States' foreign policy interests so substantially that the district court concluded the political question doctrine applies, those same interests should have been given great weight in the court's analysis whether to recognize the plaintiffs' claims under Section 1350, as we next explain in more detail.

A. Absent Congressional Directive, A Court Should Not Recognize A Common-Law Claim To Challenge A Foreign Government's Treatment Of Its Own Nationals Within Its Own Territory.

The plaintiffs' claims, although brought against private corporations rather than the Colombian government itself, attack the conduct of the Colombian Air Force. They seek to hold the defendants liable for the actions of the Colombian Air Force in allegedly carrying out the bombing of Santo Domingo, Colombia. . . .

* * * *

2. Practical consequences weigh strongly against permitting a claim under Section 1350 arising out of a foreign government's

allegedly unlawful treatment of its own citizens within its own borders.

As the *Sosa* Court recognized, the potential for adverse foreign policy effects is likely to be especially great where U.S. courts are asked to sit in judgment of the conduct of foreign officials abroad. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727.

The potential for diplomatic friction is manifest in this litigation. Both civil and criminal proceedings are pending in the Colombian courts to adjudge the lawfulness of the conduct of Colombian military officials. Duplicative proceedings in a U.S. court to second-guess the conduct of the Colombian military and the findings of Colombian courts could be viewed by Colombia as "unwarranted and intrusive," and as a slight to the Colombian judicial system. E.R. 410. The litigation could, in short, be viewed as an affront to the sovereignty of the Colombian government, with corresponding ill effects on our foreign relations with an important ally. Accordingly, and as set forth above, in the absence of a Congressional directive, this Court should not permit a claim under Section 1350 challenging the conduct of a foreign government against its own citizens and within its own territory.[2]

B. Absent Congressional Directive, A Court Should Not Impose Civil Aiding-And-Abetting Liability Under The ATS.

The United States takes no position on the question whether the plaintiffs' claims under Section 1350 are based on aiding and abetting. However, the United States respectfully disagrees with

[2] At the very least, no such cause of action should be recognized in the absence of extraordinary circumstances, such as where there is no functioning government and the political branches have determined that it would be appropriate to apply U.S. law (incorporating international law).

the district court's suggestion that Section 1350 provides for civil damages for aiding and abetting.

* * * *

2. The significant adverse practical and policy consequences of imposing civil aiding-and-abetting liability as a matter of federal common law under Section 1350 weigh heavily against such a claim.

* * * *

Judicial imposition of aiding-and-abetting liability under Section 1350 would undermine the Executive's ability to employ economic engagement as an effective tool for foreign policy, by deterring companies from doing business in countries with questionable human rights records. Indeed, lawsuits are currently pending before the U.S. Court of Appeals for the Second Circuit seeking to impose civil liability on private companies that did business in apartheid-era South Africa during the period of the United States' policy of economic engagement. *See In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), appeal pending, No. 05-2141-cv (2d Cir.). The district court in that litigation specifically pointed to the serious foreign-relations concerns that would result as grounds for refusing to impose aiding-and-abetting liability under the ATS. *See* 346 F. Supp. 2d at 550-551.

Adopting aiding-and-abetting liability under Section 1350 would also spur more lawsuits, resulting in greater diplomatic friction. Aiding and abetting could be the basis for a wide range of claims that, although brought against third-party corporations, nonetheless sought to challenge the lawfulness of a foreign government's conduct—which as *jure imperii* is typically immune from direct challenge under the Foreign Sovereign Immunities Act, *see* 28 U.S.C. §§ 1604, 1605(a)(5). Experience has shown that such suits often trigger foreign government protests, both from the nations where the alleged abuses occurred and, in some instances, from the nations where the corporations are based. Serious diplomatic friction can lead to a lack of cooperation with the United States Government on important foreign policy objectives. "To allow for expanded liability, without congressional mandate, in an

area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of [a] Court's duty to engage in 'vigilant doorkeeping.'" *In re: South African Apartheid Litig.*, 346 F. Supp. 2d at 550 (quoting *Sosa*, 542 U.S. at 729).

Finally, civil aiding-and-abetting liability could deter the free flow of trade and investment, because of the uncertainty it creates for those operating in countries where abuses might occur. The United States has a general interest in promoting trade and investment in order to increase jobs and the standard of living in this country. The United States also has an interest in promoting economic development in other countries as a means of increasing stability, democracy, and security, both in those countries and worldwide.

As set forth in the State Department letter attached to the United States' Supplemental Statement of Interest, the potential harms threatened by imposition of civil aiding-and-abetting liability are present in this very litigation. . . .

* * * *

III. THE PLAINTIFFS' CLAIMS UNDER CALIFORNIA LAW ARE ALSO BARRED.

As the district court recognized, the United States' foreign policy can have preemptive force, and can, under our Constitution, preclude the application of inconsistent state law. Even in the domestic context, several constitutional provisions limit a state's ability to project its substantive law onto conduct that occurs wholly outside its borders. . . .

Projection by a state of its legal norms onto conduct that occurs wholly within the sovereign territory of a foreign *nation* presents even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy, as the Supreme Court has recognized in cases involving preemption of conflicting state law, *see Crosby v. NFTC*, 530 U.S. 363, 384-386 (2000); *Garamendi*, 539 U.S. at 420-425; *Japan Line, Inc. v. County of Los Angeles*, 441 U.S. 434, 447-449 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434-435 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 65-68, 73-74 (1941), and extraterritorial application of federal law.

See Arabian Am. Oil, 499 U.S. at 248. Where litigation implicates the United States' foreign relations, the unique federal interests at stake may require application of federal, rather than state, law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-427 (1964); *Ungaro-Benages*, 379 F.3d at 1232.

These constitutional principles underscore the need for particular concern in balancing the relative interests of the state that seeks to apply its tort law to conduct involving a foreign government abroad, and the interests of the foreign government and, where relevant, our National Government. As the district court here recognized, any interest of California in applying its law to the alleged events in Colombia is "weak," *see* E.R. 684, while the interests of Colombia (and the United States) in having the dispute adjudicated in Colombia under Colombian law are strong. *See* E.R. 684-686. It is unnecessary for this Court to determine whether the federal foreign policy interests in this litigation would displace state law under the Constitution, however, because, even under state choice-of-law rules, the interests of the Colombian government require application of Colombian law—which the district court found would bar the state-law claims—to a dispute arising in Colombia, involving alleged harm to Colombian citizens, and challenging the lawfulness of the conduct of the Colombian military.

* * * *

c. Bancoult v. McNamara

On April 21, 2006, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of claims originally brought against U.S. current and former government officials and the United States under the Alien Tort Statute relating to the removal of persons indigenous to the Chagos Archipelago to make way for the establishment of a U.S. military facility in the Indian Ocean in the 1960s and 1970s. *Bancoult v. McNamara*, 445 F. 3d 427 (D.C. Cir. 2006), *reh'ng denied*, *Bancoult v. McNamara*, 2006 U.S. App. LEXIS 17556 (D.C. Cir. 2006). For excerpts from the U.S. brief urging affirmance, *see Digest 2005* at 415-17.

In December 2006 the Untied States filed a brief in opposition to a petition for writ of certiorari filed by plaintiff in the case, arguing that "[t]he unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals." The U.S. brief is available at *www.usdoj.gov/osg/briefs/2006/oresponses/2006-0502.resp.html*.

Excerpts follow from the D.C. Circuit opinion (footnotes and citations to submissions in the case omitted)

* * * *

As we recently stated, "the courts lack jurisdiction over political decisions that are by their nature 'committed to the political branches to the exclusion of the judiciary.'" *Schneider v. Kissinger*, 366 U.S. App. D.C. 408, 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Antolok v. United States*, 277 U.S. App. D.C. 156, 873 F.2d 369, 379 (D.C. Cir. 1989) (opinion of Sentelle, J.)). The political question doctrine is one aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974); *see also Hwang Geum Joo v. Japan*, 367 U.S. App. D.C. 45, 413 F.3d 45, 47-48 (D.C. Cir. 2005). As we find this issue to be dispositive, we do not reach any other jurisdictional issues, such as sovereign immunity, nor the merits of Appellants' claims.

IV

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker* [*v. Carr*], 369 U.S. at 210. The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). The framework laid out by the Supreme Court in *Baker* has become the authoritative taxonomy of the characteristics of political questions. . . .

The instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918).

Foreign policy decisions

> are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S. Ct. 431, 92 L. Ed. 568 (1948). . . .

* * * *

VI

Appellants concede, and we agree, that the decision to establish a military base on Diego Garcia is not reviewable. That decision was an exercise of the foreign policy and national security powers entrusted by the Constitution to the political branches of our government, and we could not reexamine the choice without making a "policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Executive branch officials "determined that it was in the best interest of the United States," *Schneider*, 412 F.3d at 195, to gain a military presence in the Indian Ocean; they achieved this goal through negotiations with the

British, a process into which the courts may not interject their judgment. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20, 57 S. Ct. 216, 81 L. Ed. 255 (1936). As the district court stated, we have no "standards by which [we] can measure and balance the foreign policy considerations at play in this case, such as the containment of the Soviet Union in the Indian Ocean thirty years ago and . . . the support of military operations in the Middle East" today. *Bancoult*, 370 F. Supp. 2d at 15. If that decision is to be reconsidered, "the people are and must be, in a sense, at the mercy of their elected representatives." *Pauling*, 331 F.2d at 799.

However, Appellants contend that "while the Executive made a political decision to secure the Chagos Islands, the Chagossians were subjected to egregious and illegal conduct during the depopulation process." Appellants claim that the manner in which the policy decision was implemented is distinct from the policy itself, and is thus reviewable. . . .

* * * *

. . . [T]he policy and its implementation constitute a sort of Mobius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken. Thus, just as we cannot review the decision to establish a base in the Indian Ocean (as Appellants concede), the same reasoning we applied in *Schneider* dictates that we cannot review the manner in which that decision was carried out. The political branches must "determine whether drastic measures should be taken in matters of foreign policy and national security," *id.*, and the President "must determine what degree of force [a] crisis demands," *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 670, 17 L. Ed. 459 (1863). We cannot second-guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been. In this respect, the specific steps taken to establish the base did not merely touch on foreign policy, but rather constituted foreign policy decisions themselves. If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing

the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence. The courts may not bind the executive's hands on matters such as these, whether directly—by restricting what may be done—or indirectly—by restricting how the executive may do it. Finally, while the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches, no such constitutional claims are at issue in this case. . . .

VII

The same considerations that render nonjusticiable the claims against the United States also bar the claims against the individual Appellees. Even were Appellants to demonstrate that the individual Appellees' actions were not in conformance with presidential orders, the actions alleged were still closely enough connected to Appellees' employment to bring them within the ambit of the political question doctrine. . . . Although we need not resolve whether traditional agency principles guide the application of the political question doctrine, we have little trouble rejecting the claim that Appellees' acts fell outside the scope of their employment and therefore receive no shelter from the political question doctrine.

* * * *

. . . [T]he claims against the individual Appellees are barred by the same separation of powers concerns that prevent the court from examining the claims against the United States. Examining these claims would require the court to judge the validity and wisdom of the executive's foreign policy decisions, as Appellees' acts were inextricably part of those policy decisions. This rationale does not entail some new form of immunity for executive officers who take actions in pursuit of foreign policy or national security goals; we merely hold that when the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the individuals who committed the acts in question within the scope of their employment.

* * * *

d. Presbyterian Church of Sudan v. Talisman

On September 12, 2006, the U.S. District Court for the Southern District of New York granted summary judgment to defendant Canadian energy company on claims that it conspired with and aided and abetted the Government of Sudan in committing international law violations. *Presbyterian Church of Sudan v. Talisman*, 453 F. Supp. 2d 633 (2006). *See Digest 2005* at 394-400 for previous district court decision rejecting a motion by Talisman for judgment on the pleadings. 374 F. Supp. 2d 331 (2005). In its 2006 opinion, the district court concluded that the plaintiffs had not "gathered sufficient admissible evidence to show that Talisman engaged in any of the violations of international law on which it stands accused by the plaintiffs." *Talisman*, 453 F. Supp 2d at 638. Excerpts below from the decision describe the claims and provide the court's analysis (footnotes omitted).

* * * *

. . . [T]he plaintiffs seek to hold Talisman liable for having conspired with or aided the [Sudanese] Government in committing three crimes recognized under international law: genocide, crimes against humanity, and war crimes. The crime against humanity that is at stake is the widespread and systematic forcible transfer of a civilian population. The war crime is the targeted attacks by the military on civilians.

* * * *

. . . The plaintiffs do not oppose the motion for summary judgment to the extent that it is addressed to Talisman's direct liability for violations of customary international law. Therefore, it is only necessary to address whether Talisman has shown that it is entitled to summary judgment on the claims of conspiring with and aiding and abetting the Government.

A. Conspiracy

* * * *

In opposition to the motion for summary judgment, the plaintiffs have described the conspiracy that they intend to prove at trial

as follows. The conspiratorial agreement, formed between the Government and Arakis [a Canadian corporation acquired by Talisman in 1998], was to clear the oil concession and surrounding area of all non-Muslim, African civilians. Talisman joined the conspiracy to displace residents with knowledge of its goal, and furthered its purpose principally by (a) designating new areas for oil exploration understanding that that would require the Government to "clear" those areas, (b) paving and upgrading [certain] airstrips with knowledge that Government helicopters and bombers would use them in launching attacks on civilians, and (c) paying royalties to the Government with the knowledge that the funds would be used to purchase weaponry.

Knowing participation in a forcible transfer of population, when part of a widespread or systematic attack directed against a civilian population, is a crime against humanity and a violation of customary international law. *See Presbyterian Church*, 226 F.R.D. at 480-81. The plaintiffs argue that, having joined the conspiracy to displace a population, Talisman is liable for the acts of all other conspirators taken in furtherance of the conspiracy, which it identifies as the "well-settled" law of conspiracy articulated in *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). It locates evidence that the *Pinkerton* doctrine is recognized in international law in a judgment of the trial chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Nahimana*, Case No. ITCR-99-52-T, Judgement and Sentence, P1045 (Trial Chamber, Dec. 3, 2003). Under the *Pinkerton* doctrine, a "defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement." *United States v. Bruno*, 383 F.3d 65, 89 (2d Cir. 2004) (citation omitted).

The plaintiffs misconstrue the reach of international law in at least two respects. First, the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war. Second, international law does not recognize a doctrine of conspiratorial liability that would extend to activity encompassed by the *Pinkerton* doctrine.

The starting point for this discussion must be *Sosa*, 542 U.S. at 692. In *Sosa*, the Court explained that a claim under the "present-day law of nations" may form the basis for an ATS claim only to the extent it rests "on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that Congress had in mind when it enacted the ATS. Id. at 725.

While international law has recognized since the prosecution of Nazi war criminals that liability can be based on participation in a conspiracy, *Presbyterian Church*, 244 F. Supp. 2d at 322, as of today international law applies the charge of conspiracy in only two circumstances: "conspiracy to commit genocide and common plan to wage aggressive war." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2784, 165 L. Ed. 2d 723 (2006). Indeed, in *Nahimana*, the defendants were charged with conspiring to commit genocide. *Nahimana*, Judgement and Sentence at PP8-10, PP1040-55.

* * * *

. . . As described above, [plaintiffs] contend that Talisman joined a conspiracy to commit a crime against humanity, specifically, a widespread and systematic attack on a civilian population to displace it forcibly. As a result, the defendants' motion for summary judgment on the conspiracy claim is granted.

It should also be noted before leaving this subject, however, that even if the plaintiffs continued to press a claim that Talisman conspired to commit genocide, they would not be able to rely on the *Pinkerton* doctrine to impose liability on Talisman. "The Anglo-American concept of conspiracy was not part of European legal systems," *Hamdan,* 126 S. Ct. at 2784 (citation omitted), at the time of the Nuremberg tribunals, and has never found acceptance in international law. While both the ICTY and ICTR Statutes recognize conspiracy as a mode of imposing liability for the crime of genocide, neither statute contains language supporting the application of the *Pinkerton* principle. Thus, Talisman could not be held liable under the ATS for the conduct of a co-conspirator merely because that conduct was foreseeable.

* * * *

B. Aiding and Abetting

Talisman has also moved for summary judgment on the plaintiffs' sole remaining claim, the claim that Talisman aided and abetted the Government in committing genocide, torture, war crimes, and crimes against humanity. This Court has previously referred to the Ninth Circuit's finding that there is a "settled, core notion of aider and abettor liability in international law" that requires a plaintiff to show "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime." *Talisman*, 374 F. Supp. 2d. at 340 (citing *Doe I v. Unocal Corp*., 395 F.3d 932, 951 (9th Cir. 2002)). To address the issues presented by Talisman's motion, it is appropriate to set forth the elements of aiding and abetting liability under international law with more precision.

1. The Elements of Aiding and Abetting Liability Under International Law

The ICTY, ICTR and ICC each impose liability on individual defendants for aiding and abetting the commission of a crime. ICTY Statute at 7(1); ICTR at 6(1); Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 25(3), U.N. Doc. A/CONF.183/9 (1998) ("Rome Statute").

* * * *

The Appeals Chamber of the ICTY has described the *actus reus* of aiding and abetting as requiring that the accused carry out "acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime" and that this support have "a substantial effect upon the perpetration of the crime." *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, P102(i) (App. Chamber, Feb. 25, 2004) (emphasis supplied). The mental element of the crime of aiding and abetting or mens rea is defined as "knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal." *Id.* at P102(ii). To have a "substantial effect" it is not necessary to show that assistance constituted an indispensable element of the crime, only that "the criminal act most probably would not

have occurred in the same way had not someone acted in the role the accused in fact assumed." *Talisman*, 244 F. Supp. 2d. at 324 (citing *Prosecutor v. Tadic*, Case No. 94-1-T, Opinion and Judgment, P688 (Trial Chamber, May 7, 1997)).

* * * *

The international law of aiding and abetting liability closely parallels federal criminal law. . . .

Aiding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the ATS. *See Sosa*, 542 U.S. at 725. To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:

1) that the principal violated international law;
2) that the defendant knew of the specific violation;
3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
5) that the defendant was aware that the acts assisted the specific violation.

The plaintiffs have not identified sufficient evidence to raise a material question of fact that Talisman can be found liable for aiding and abetting the Government in the commission of genocide, crimes against humanity, or war crimes, because among other things they have not identified evidence that Talisman itself performed any act that could be construed as substantial assistance to the Government in its violation of international law. . . .

* * * *

The plaintiffs essentially argue that Talisman understood that the Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that understanding that to be so, Talisman should not have come. They have no evidence that

Talisman . . . participated in any attack against a plaintiff and no direct evidence of Talisman's illicit intent, so they wish to argue that Talisman's knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, is a sufficient basis from which to infer Talisman's illicit intent when it designated areas for exploration, upgraded airstrips or paid royalties. . . .

* * * *

Knowledge that [Sudan government] attacks [on civilians] had occurred and would likely occur again simply does not provide circumstantial evidence of an intent to assist in those attacks by the payment of royalties. The plaintiffs have pointed to no evidence that Talisman urged that such attacks be made. Quite to the contrary, the evidence to which the plaintiffs have directed the Court's attention on this motion includes several examples of Talisman speaking either with the head of . . . security [of an entity in which Talisman's indirect subsidiary held shares] or the Government to discourage such attacks and advocate that oil revenues be spent for development. . . . The connection between the payment of royalties and the Government attacks on civilians is simply too indirect to permit the payment of royalties itself to serve as circumstantial evidence of an intent to assist in the Government's commission of war crimes and crimes against humanity.

* * * *

e. Matar v. Dichter: *No cause of action*

On November 17, 2006, the United States filed a Statement of Interest in the U.S. District Court for the Southern District of New York arguing that "[i]t would be an improper exercise of the [federal court's power to create common-law causes of action for violations of international law] to create a cause of action based on a norm—proportionality in the use of military force—that, however well accepted, is subjective, open-ended, and susceptible to considerable controversy in its application [and would] exceed judicial competence and

intrude on the Executive's control over foreign affairs." *Matar v. Dichter*, 05 Civ. 10270 (WHP). The claims in this case were against Avraham Dichter, former Director of Israel's General Security Service, for his role in an Israeli military attack in the Gaza Strip in July 2002. *Matar v. Dichter*, 05 Civ. 10270 (WHO). As explained in the U.S. Statement:

> The attack struck a residential apartment building where Saleh Mustafa Shehadeh, a leader of the armed wing of the Hamas terrorist organization, had been determined by Israeli intelligence to be at the time. Shehadeh was killed in the attack, but a substantial number of civilians were killed or wounded as well. Plaintiffs, surviving victims of the attack, claim that the attack was unlawful under international law by virtue of targeting a building where civilians were known to be located. Their principal claims are brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for alleged "war crimes," "crimes against humanity," "cruel, inhuman, or degrading treatment or punishment," and "extrajudicial killing" within the meaning of the Torture Victim Protection Act ("TVPA"), Pub. L. 102-256 (1992), codified at 28 U.S.C. § 1350 note. After Dichter moved to dismiss plaintiffs' complaint on grounds of the Foreign Sovereign Immunities Act ("FSIA"), the political question doctrine, and the act of state doctrine, the Court issued an order on July 20, 2006, inviting the United States to "state its views, if any, on these issues or on any other issues it considers relevant to the case." . . .
>
> At the outset, it should be made clear that the United States has voiced serious objections to the Shehadeh attack, which are a matter a public record. As the State Department said at the time: "We have repeatedly criticized the use of heavy weaponry in densely populated areas because of these kind[s] of dangers of large numbers of innocent civilians being killed." In filing this Statement of Interest, the United States does not seek to revisit these issues and takes no position herein as to the lawfulness of the Shehadeh attack. Rather, the United States

> makes this submission in order to clarify its views on two issues with broad-reaching ramifications for U.S. interests: (1) whether foreign officials are immune from civil suit for their official acts; and (2) whether federal law recognizes a private cause of action for the disproportionate use of military force in armed combat.

Further excerpts below address the ATS issue (most footnotes and citations to other submissions omitted).

The statement also argued that the Torture Victim Protection Act ("TVPA") should not "be read to supply a vehicle for plaintiffs' claims," discussed in 2.a. below. *See also* Chapter 10.A.2. for U.S. views concerning the immunity of Dichter as former Director of Israel's General Security Service, including the fact that the TVPA does not trump immunity of foreign officials for their official acts.

* * * *

THE COURTS SHOULD NOT RECOGNIZE A CIVIL CAUSE OF ACTION FOR THE DISPROPORTIONATE USE OF MILITARY FORCE

Given Dichter's immunity from suit, the Court has no occasion to reach the merits of the case. However, even if Dichter were found to lack immunity, plaintiffs' complaint should still be dismissed for failure to state a valid cause of action under federal law.

Plaintiffs' complaint, at its core, asks this Court to adjudicate the proportionality of a military targeting decision by a foreign nation, in order to determine whether the degree of force used was unjustified by any legitimate military objective. While plaintiffs acknowledge that the target of the attack in question was a Hamas military leader, Saleh Mustafa Shehadeh, they do not purport to bring any claims on Shehadeh's behalf. Instead, plaintiffs are survivors of the attack who bring claims on behalf of non-targeted civilians injured or killed in the operation. The crux of these claims is the allegation that Dichter violated international law in planning

and authorizing the strike by, as plaintiffs put it, failing to "take all feasible precautions in the choice of means and methods of attack, with a view to avoiding or minimizing loss of civilian life and injury to civilians."

No such civil cause of action exists within federal law, nor should this Court recognize one. While plaintiffs rely heavily on customary international law and the Geneva Conventions as the basis for their claims, these sources do not by themselves supply a federal private cause of action.[27] Thus, plaintiffs' claims are cognizable only if they may be brought under federal common law pursuant to the Supreme Court's decision in *Sosa v. Alvarez-Machain* or if they may be brought under the TVPA. As explained below, however, neither federal common law nor the TVPA provides a basis for plaintiffs' claims. Indeed, the creation of such a cause of action would raise serious concerns about the respective roles of the judiciary and the political branches in addressing sensitive disputes regarding armed conflicts abroad.

[27] It is well settled that international treaties do not generally provide private litigants with enforceable rights. *See Head Money Cases*, 112 U.S. 580, 598 (1884); *see also* Restatement (Third) of Foreign Relations Law of the United States (1986), § 907 cmt. a ("International agreements, even those directly benefit[t]ing private persons, generally do not create private rights or provide for a private cause of action in domestic courts"); . . . Indeed, the recent Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631 (2006)("MCA"), provides that no person may invoke the Geneva Conventions and its protocols in any civil action against members of the U.S. armed forces for whom the United States bears international responsibility. This reflects Congressional intent not to use the federal courts as a venue for adjudicating private claims for violations of the Geneva Conventions, even in instances where there is a strong connection with the United States. Implying such an action under the ATS, where there is no such connection, would be anomalous. See Section 5 of MCA ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus proceeding or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States, is a party as a source of rights in any court of the United States or its states or territories.") Nor does customary international law supply a federal cause of action, except to the extent permitted by the Supreme Court's decision in *Sosa v. Alvarez-Machain*. *See infra* at 37-47.

06-Cummins-Chap06.indd 468 10/22/07 11:40:34 PM

A. The Courts Have No Authority to Create a Federal Common Law Cause of Action under the ATS for the Disproportionate Use of Military Force

* * * *

. . . [T]he *Sosa* Court left the door of federal common law open only to a "very limited category" of international law claims, *id.* at 728, "subject to vigilant doorkeeping," *id.* at 729. . . .

All of the[] considerations [set forth in *Sosa*] counsel strongly against recognizing a private cause of action under federal common law for the international law violations alleged here. As a preliminary matter, the courts should be very hesitant to recognize a federal common law cause of action for *any* claim centering on a foreign government's treatment of foreign nationals in foreign territory. There is a strong presumption generally against projecting U.S. law onto disputes arising in foreign territories – a presumption which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Notably, the same strong presumption existed in the early years of the nation; even the federal statute that punished, as a matter of U.S. law, one of the principal offenses under the law of nations – piracy – was held not to apply where a foreign state had jurisdiction. *See United States v. Palmer*, 16 U.S. 610, 630-31 (1818) (the federal piracy statute should not be read to apply to foreign nationals on a foreign ship); *see also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807).

In light of this presumption, which is strongly reinforced by the judicial restraint mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law power under the ATS to entertain such extraterritorial claims. Indeed, the *Sosa* Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727-28. Moreover, nothing in the ATS, or in its contemporary history, suggests that Congress intended the statute to apply to conduct in foreign lands. To the contrary, the assaults on ambassadors that

preceded and motivated the enactment of the ATS involved conduct purely within the United States. The point of the ATS was to ensure that the United States would be able to provide a forum for redressing such violations, thereby *preventing* diplomatic conflicts with the nations offended by such conduct. *See id.* at 715, 720, 723-24 & n.15; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) ("[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."). Suits against a foreign government for conduct occurring in foreign territory are entirely removed from these types of concerns.

In any event, whatever limited discretion the courts might have to extend the ATS to certain claims involving extraterritorial conduct, they certainly should not exercise that discretion to recognize a federal cause of action for the disproportionate use of military force in the context of a foreign armed conflict. Such a cause of action would not, as *Sosa* requires, "rest on a norm of international character . . . defined with a specificity comparable to the features of the 18th-century paradigms" recognized at the time the ATS was enacted. *Sosa*, 542 U.S. at 725.

Indeed, a comparable norm was rejected in *Sosa* itself, where the Court found that the international law norm against "arbitrary" detention was not sufficiently well defined to merit recognition as the basis for a federal common law cause of action. As the Supreme Court explained, although many nations recognize this norm, this consensus exists only "at a high level of generality." *Id.* at 737 n.27. Accordingly, the norm could not be taken as the predicate for a federal lawsuit, for by itself it fails to specify what qualifies as "arbitrary" in any particular case. *Id.* at 737-38. As the Court concluded, "[w]hatever may be said for the broad principle [plaintiffs] advance[], in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738.

Likewise, while all agree in the abstract that military force should not be "disproportionate" to military objectives, this moral clarity tends to dissipate in the application of principle to practice. The provisions of the Geneva Conventions cited in plaintiffs' complaint serve to illustrate. For example, plaintiffs cite Article 52 of

06-Cummins-Chap06.indd 470 10/22/07 11:40:34 PM

Additional Protocol I, which forbids attacks on "civilian objects"—meaning "objects which are not military objectives." *See* Protocol Additional to the Geneva Conventions of 12 August 1949 (adopted Jun. 8, 1977), *reprinted in* 16 I.L.M. 1391 (1977) ("Additional Protocol I"), Art. 52, cl. 1. The term "military objectives" is defined in turn as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Id.*, Art. 52, cl. 2. Yet, putting aside for the moment that the United States has never ratified Additional Protocol I of the Geneva Conventions, the problem is that the cited Article fails to specify what constitutes "an effective contribution to military action" or "a definite military advantage"—nor can such specificity be expected, since these determinations are highly value-laden and context-specific. Along similar lines, plaintiffs cite Article 57 of Additional Protocol I, which provides, *inter alia*, that "[t]hose who plan or decide upon an attack shall . . . [r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Additional Protocol I, Art. 57, cl. 2(a)(iii). Again, the rub lies in determining what counts as "excessive." Any number of intangibles must be onsidered: How important is the military objective sought to be achieved? What are the pros and cons of each option available to achieve that objective? For each option, what is the probability of success? What are the costs of failure? What are the risks of civilian casualties involved in each option? What are the risks of military casualties involved in each option? How are casualties of either kind to be weighed against the benefits of the operation?[28]

[28] As the commentary to Article 57 itself acknowledges, its terms "are relatively imprecise and are open to a fairly broad margin of judgment." Additional Protocol I, Art. 57, cmt. 2187, *available at* http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument. Indeed, the ambiguity of the provision, coupled with the possibility of prosecutions for grave breaches of the Article, led several delegations to object to it as "dangerously imprecise" and imposing a "very heavy burden of responsibility . . . on military commanders." *Id.*

06-Cummins-Chap06.indd 471 10/22/07 11:40:34 PM

In short, questions of proportionality are highly open-ended, and the answers to them tend to be subjective and imprecise. *See Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005) (rejecting ATS claim based on Geneva Conventions provision prohibiting destruction of personal property "except where such destruction is rendered absolutely necessary by military operations" as a "subjective" norm that "is not sufficient under *Sosa*"). As stated in a recent report by a committee established to review the NATO bombing campaign in Yugoslavia:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48, *available at* http://www.un.org/icty/pressreal/nato061300.htm. Thus, while there are certainly clear-cut cases on the extremes, the proportionality principle fails to provide a serviceable rule of decision in the large run of cases; accordingly, it does not possess the specificity required under *Sosa* to afford a federal common law cause of action. *See Sosa*, 542 U.S. at 737 ("[A]lthough it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce

them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses.").

This conclusion is bolstered by the "practical consequences" of recognizing such a civil cause of action. *Id.* at 738. As in *Sosa*, the implications of transforming the international norms on which plaintiffs rely into a springboard for federal litigation would be "breathtaking." *Id.* at 736 (finding that allowing ATS suits for "arbitrary" detention "would support a cause of action in federal court for any arrest, anywhere in the world"). Civilian casualties frequently occur in armed conflict. Were lawsuits such as this one cognizable under the ATS, the federal courts could quickly become embroiled as referees of such conflicts around the world, called upon whenever civilian casualties occur to adjudge the legitimacy of the military action that caused them.

The assumption of such a far-reaching role would plainly strain the competence of the judiciary. Initially, discovery into the knowledge, planning, and motives behind a foreign military attack would tend to be impracticable: most, if not all, of the relevant evidence would be in the exclusive control of governments and officials beyond the jurisdiction of the federal courts; and the information at issue would presumably be mostly classified or otherwise privileged. . . . But more fundamentally, given the lack of a specific, objective standard of decision, even if the relevant information were discoverable, its "digestion" would in any event often be "beyond judicial management." *Id.* at 1312. Indeed, in non-ATS cases raising issues of military proportionality, courts have generally abstained on political question grounds, in large part due to a lack of judicially manageable standards. . . . Judges—being "'deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action,'" *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (quoting *Da Costa v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973))—are generally in a poor position to resolve such questions, yet they could be frequently put in this position were claims such as plaintiffs' deemed cognizable under the ATS.

Moreover, not only do the courts lack a sufficiently reliable compass to become regular travelers in this subject matter area,

but were they to do so, they would inevitably cross paths with the Executive in its management of foreign affairs. It is an unfortunate fact that violent conflict remains a virtual constant in human affairs and exists today in numerous parts of the world – not only in Israel and the occupied territories, but also in Iraq, Afghanistan, Chechnya, Sudan, Kashmir, and elsewhere. Civilian casualties arising from these hostilities can generate considerable political and diplomatic controversy, as this case offers but one illustration. When such controversy arises, it is important for the Executive to be able to speak for the government with one voice – or, for that matter, to keep silent; given the global leadership role of the United States, its pronouncements can draw intense international scrutiny and carry significant political and diplomatic consequences. To allow overseas hostilities to become fodder for federal lawsuits would invite a stream of unpredictable commentary from the courts, creating "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Moreover, such suits would subject the foreign states and officials involved to the burdens and embarrassments of litigation, leading to strains in U.S. relations. In both respects, such litigation would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all. *See Sosa*, 542 U.S. at 727-28 (warning that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences"); *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("We have . . . consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'") (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)).

Of significant interest, Congress specifically paid heed to such foreign policy concerns in drafting the War Crimes Act of 1996, Pub. L. 104-492 (1996), *codified as amended at* 18 U.S.C. § 2441. The statute, as enacted, criminalizes grave breaches of the Geneva Conventions committed by or against members of the U.S. military or U.S. nationals. *Id.* However, when the bill was under consideration

by Congress, the Executive Branch proposed expanding the scope of coverage to include grave breaches committed by any individual who was subsequently found in the United States – regardless of whether that perpetrator, or the victim of the breach, was a member of the U.S. military or a U.S. national. As explained in the report of the House Judiciary Committee, this proposal was rejected:

> The Committee decided that the expansion . . . to include universal jurisdiction would be . . . unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal. If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are inadequate to meet the task.

H.R. Rep. 104-698, at 8 (1996), 1996 U.S.C.C.A.N. 2166, 2173 (emphasis added). Thus, even in the *criminal* context, with the check of prosecutorial discretion, Congress was unwilling to bestow the federal courts with universal jurisdiction to adjudicate even "grave" breaches of the Geneva Conventions, for fear of the possible foreign policy ramifications. Plainly, then, the courts have no license to devise, on their own initiative, a *civil* cause of action under federal common law for breaches of the Geneva Conventions—"grave" or not—as alleged by plaintiffs here. The fact that Congress has not even ratified the particular provisions of Additional Protocol I on which plaintiffs rely further underlines the impropriety of courts jumping ahead of Congress on these issues. *See Sosa*, 542 U.S. at 726 . . .

In sum, because any consensus regarding the principle of proportionality exists only "at a high level of generality," *Sosa* at 736 n.27,

and because the transformation of that principle into the basis for a private cause of action would entail troublesome practical (and potentially constitutional) problems as between the courts and the Executive, this Court should not recognize a federal common law cause of action for plaintiffs' claims.

f. Legal Adviser letters

On August 2, 2006, the United States filed a Statement of Interest in the U.S. District Court for the Northern District of Alabama in response to a request from the court in a case alleging that the defendant U.S. company and others were liable for the torture and murder by paramilitaries in Colombia of certain employees who were active in union affairs. *Romero v. Drummond Co.*, CV-03-BE-0575-W, *Rodriguez v. Drummond Co.*, CV-02-BE-0665-W, *Suarez v. Drummond Co.*, CV-03-BE-1788-W, *Ruiz v. Drummond Co.*, CV-04-BE-0241-W, *Doe v. Drummond Co.*, CV-04-BE-0242-W. Portions of the original complaint were dismissed in October 2003. *Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, N.D.Ala. 2003). Excerpts from the U.S. Statement of Interest follow. The U.S. brief in *Khulamani v. Barclay National Bank, LTD* referred to both here and in the *Constant* case below, is available at *www.state.gov/s/l/c8183.htm*. *Khulamani* was argued in January 2006 and was pending at the end of the year.

On May 15, 2006, the Court sent a letter to the United States Department of State and the United States Department of Justice requesting the views of the United States as to the possible impact that adjudication of these pending consolidated lawsuits might have upon the conduct of foreign affairs. Specifically, the Court inquired of three matters: (1) Whether the State Department, at the appropriate level, is aware of and/or monitoring these cases. If so, did the State Department make a prior decision not to intervene in these cases; (2) Whether the State Department has an opinion (non-binding) as to whether continued adjudication of this matter may have an adverse impact on the interests of the United

States; and (3) Whether plaintiff Jimmy Rubio Suarez, a Colombian citizen now residing in Venezuela for whom an arrest warrant allegedly has been issued by Colombian authorities, should be permitted to maintain this action from, and be deposed in a third country. (fn. omitted).

* * * *

The United States also respectfully wishes to advise the Court that it has recently argued in statements of interest filed in matters pending before the Second and Ninth Circuits that, absent a clear direction from Congress, courts should not recognize civil aiding and abetting claims under the Alien Tort Statute ("ATS"). The United States takes no position on whether, or to what extent, plaintiffs are advancing such a claim in these actions. Nevertheless, for the Court's reference, the United States is attaching hereto a brief filed in *Khulamani v. Barclay National Bank, LTD*., Nos. 05-2141, 05-2326 (2d Cir.), which addresses this issue.[2]

A letter attached to the Statement of Interest from John B. Bellinger, III, Legal Adviser of the Department of State, contained the following responses to the three questions. The full texts of the Statement of Interest and Mr. Bellinger's letter are available at *www.state.gov/s/l/c8183.htm*.

* * * *

Question 1. The Department of State was aware of these cases. The Department of State does not routinely involve itself in district court cases to which the United States is not a party. Given the large number of such cases and the variety of considerations that affect whether the Department becomes involved in such cases, no inference should be drawn about the Department's views regarding a particular case in which it has not participated, or as to questions which it has not addressed.

[2] The United States acknowledges that its position appears to be contrary to *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (holding that the ATS "permit[s] claims based on direct and indirect theories of liability").

Question 2. The Department of State does not have an opinion at this time as to whether continued adjudication of this matter will have an adverse impact on the foreign policy interests of the United States. The Department notes, however, that these cases involve claims asserted under the Alien Tort Statute (ATS). In its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), rendered after the commencement of proceedings in these cases, the Supreme Court cautioned that courts should not exercise their common law authority to hear claims based on international norms that have "less definite content and acceptance among civilized nations than the historical paradigms" familiar when the statute was enacted in the 18th century. *Id.* at 732. As *Sosa* explained, this limit on the availability of claims is one manifestation of the "vigilant doorkeeping" (*id.* at 729) that courts should exercise in such cases.

Question 3. The Department of State is not aware of any foreign policy concerns that would be raised if this plaintiff were permitted to maintain this action from, or be deposed in, a third country.

The Department of State, of course, takes no position with respect to the merits of the litigation, and would not condone or excuse any violations of human rights or humanitarian law that may have occurred in connection with the incidents underlying this case.

On September 28, 2006, the United States filed a Statement of Interest in the U.S. District Court for the Southern District of New York in *Doe v. Constant,* 04 Civ. 10108 (SHS). As noted above, the Statement of Interest in *Doe* also attached the U.S. brief in *Kuhlamani.* Excerpts below address points different from those in *Drummond, supra.* On October 24, 2006, the district court entered a default judgment against Constant, accepting the allegations of the complaint as true and holding him "liable for torture, attempted extrajudicial killing, and crimes against humanity pursuant to the ATS and TVPA" in Haiti and awarded compensatory and punitive damages to the plaintiffs totaling $19 million. *Doe v. Constant*, 04 Civ. 10108 (SHS), available at *www.state.gov/s/l/c8183.htm.*

* * * *

The complaint raises a significant number of complex legal issues, including by making a number of assertions about the content of customary international law and the applicability of international humanitarian law to non-state actors. In addition, claims are asserted under the jurisdiction granted to federal courts by the Alien Tort Statute (ATS). . . .

The Department of State understands that an order of default has been entered in this case because the defendant has failed to appear. The Government of Haiti has not expressed interest in this case to the Department.

Under these circumstances, the concerns that the Department of State would have relating to the case would focus on the articulation of legal principles by the Court, which will not have the benefit of briefing from both sides. To the extent possible, the Department's concerns could be avoided if the judgment were entered without necessarily endorsing the theories espoused in the complaints.

* * * *

2. Torture Victim Protection Act

a. No cause of action

As discussed in 1.e. *supra*, the United States argued in its Statement of Interest in *Matar v. Dichter* that allegations based on a claimed disproportionate use of military force should not provide a cause of action under the ATS. The U.S. submission also argued that the TVPA should not be read to provide a cause of action for these claims, as excerpted here.

---

* * * *

. . . As the *Sosa* Court noted, the TVPA "is confined to specific subject matter" – namely, torture and "extrajudicial killing." 542 U.S. at 728. While plaintiffs construe the statute's prohibition of "extrajudicial killing" to cover the deaths of non-targeted civilians in armed conflict, the statute was not intended to sweep so broadly.

The statutory text indicates that Congress understood "extrajudicial killing" to be an especially grave offense, entailing more than unintentional civilian deaths. Thus, the term "extrajudicial killing" is defined in the statute as "a *deliberated* killing not authorized by a previous judgment pronounced by a regularly constituted court. . . ." TVPA § 3(a) (emphasis added). The term "deliberated," while to some extent ambiguous, suggests that Congress intended only to reach killings that are specifically intended, and not the collateral consequence of action taken for some other purpose. *See* TVPA House Report at 5, 1992 U.S.C.C.A.N. at 87 ("The inclusion of the word 'deliberated' is sufficient . . . to [exclude] killings that lack the requisite extrajudicial intent, such as those caused by a police officer's authorized use of deadly force.").[33] Moreover, the statute's prohibition on "extrajudicial killing" cannot be read in isolation, but rather must be read in the context of the statute as a whole. . . . The fact that the TVPA pairs "extrajudicial killing" with torture indicates that the conduct Congress sought to reach was on a moral par with torture, and that both offenses involve unlawful conduct purposefully undertaken to cause harm to a specific victim—death in the case of extrajudicial killing, and physical and mental pain or suffering in the case of torture. *See* TVPA § 3(b) (defining torture to involve such harm of an individual where the harm is "intentionally inflicted on that individual").

The legislative history squarely confirms these conclusions. Both the House and Senate reports repeatedly use the term "extrajudicial killings" interchangeably with "summary executions." *See* TVPA House Report at 3-4; TVPA Senate Report at 3-5. The term "summary execution" plainly implies a specific intent to kill, as the examples given in the legislative history illustrate. Thus, the House Report explains that the statute was intended to codify the holding of *Filartiga v. Pena-Irala*, *supra*, in which the Second Circuit allowed an alien to bring suit under the ATS over the death of a family member who had been "tortured to death" by an official of a foreign government. TVPA House Report at 3-4, 1992

[33] While the Report says "include" rather than "exclude," the context in which the statement occurs makes clear that is a typographical error.

U.S.C.C.A.N. at 86. The Senate Report likewise explains that the statute is targeted at acts of such depravity, citing a report that in the year preceding the statute's enactment there were "100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads." TVPA Senate Report at 3. These acts are of a different order compared to unintended civilian deaths resulting from military operations, which the term "summary execution" simply does not fit.

As further made clear in the legislative history, the statute singles out "summary executions" along with torture because Congress viewed both as uniquely incontrovertible human rights violations. *See* TVPA House Report at 2, 1992 U.S.C.C.A.N. at 85. . . . Yet, again, there is no such categorical consensus concerning what acts are prohibited by the principle of proportionality. Thus, interpreting the TVPA to cover non-purposeful civilian casualties caused by the use of military force would transform a statute intended to supply an "unambiguous" cause of action, TVPA House Report at 3, into one requiring highly debatable applications of international law. Congress did not intend to authorize such a judicial venture into unknown territory. . . .

Indeed, allowing plaintiffs to bring their claims under the auspices of the TVPA would give rise to the same undesirable "practical consequences" that would follow were plaintiffs' claims recognized under federal common law: it would invite a flood of cases seeking for the federal courts to regulate the proportionality of military operations in armed conflicts worldwide. There is no reason to believe that Congress intended to so burden the courts, or to create such potential for conflict with the Executive's management of foreign affairs. Indeed, at the time the TVPA was enacted, the Executive expressed serious concern that cases brought under the statute could complicate diplomatic relations with other nations. *See* TVPA Senate Report at 14-15. In response, the proponents of the statute stressed that it was intended to be of narrow scope and was not anticipated to give rise to a large number of cases. . . . Yet plaintiffs' reading of the statute would put the courts in the position of having to field all manner of disputes arising from foreign armed conflicts—disputes that generally lie beyond the competence of the judiciary to resolve and that are rife

with potential for foreign-policy conflicts of precisely the kind the Executive forewarned against. Congress plainly had no such far-reaching agenda in enacting the statute. Accordingly, the Court should not construe the TVPA to provide a cause of action for plaintiffs' claims.[36]

b. Exhaustion requirement: Futility

Section 2(b) of the TVPA provides: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note. In 2005 the Seventh Circuit dismissed claims based on allegations of torture and extrajudicial killing brought under the ATS against a Nigerian public official, holding that such claims must be brought under the TVPA, and remanded for a determination as to whether the exhaustion requirement was satisfied. *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1341 (2006). *See* discussion in *Digest 2005* at 425-27.

On remand, on June 27, 2006, the U.S. District Court for the Northern District of Illinois, denied a motion for summary judgment by the defendant public official on the exhaustion requirement. *Abiola v. Abubakar*, 435 F. Supp. 2d 830 (N.D.Ill. 2006). The court noted that the TVPA exhaustion requirement had been interpreted to allow rebuttal based on, among other things, that local remedies were "obviously futile" and concluded:

> Plaintiffs have . . . satisfied their burden of proving futility. Specifically, they have established that [Nigeria's Public

[36] These same concerns—over judicial competence and interference with the Executive's conduct of foreign affairs—sound as well under the political question doctrine, *see supra* nn. 29 & 31; and if plaintiffs had a valid cause of action by which to bring their claims, there would be a serious issue whether this *particular* case should be dismissed on political question grounds, as Dichter argues. . . .

06-Cummins-Chap06.indd 482 10/22/07 11:40:36 PM

> Officers Protection Act ("POPA")] required them to sue Abubakar, who at all relevant times was a public officer in Nigeria, within three months of the accrual of their causes of action. Plaintiffs' causes of action accrued on or before August 24, 1998. Three months from that date, the military regime was still in power. In short, plaintiffs' Nigerian causes of action expired before democracy was restored in Nigeria and before there is any basis in the evidence to believe that a judicial remedy was anything other than illusory.
>
> * * * *

The United States took no position on the exhaustion issue in the case; the court did rely, in part, on the U.S. Department of State Country Reports on Human Rights Practice for Nigeria. The court stated:

> Even if the POPA would not apply to the plaintiffs' claims (though the evidence provides no basis for such a belief), the Department of State Country Reports from 2000-2005 sufficiently cast doubt on the adequacy of a Nigerian judicial forum. The reports, including the most recent one issued in 2006, specifically state that the judicial system does not function adequately because of corruption and underfunding. The Court sympathizes with Abubakar's argument that the Country Reports, at least on their face, do not evidence a thorough analysis—statistical or otherwise—of the state of the Nigerian judicial system. Nevertheless, federal courts routinely recognize that these reports are evidence of a country's stance on human rights. . .
>
> The Seventh Circuit has cautioned against over-relying on Country Reports, particularly because it is difficult for parties to question their conclusions. . . . In this case, however, Abubakar has hardly attempted to question the reports' conclusions with evidence other than his expert's unsupported assertions. . . . Based on the

> evidence presented to the Court, we believe that the conclusions contained in the Country Reports satisfy plaintiffs' burden. . . . This is, however, an alternative basis for our holding; as discussed above, plaintiffs satisfied their burden of proving futility even without relying on the Country Reports.

See A.1.a. *supra* concerning the human rights reports generally.

c. Failure to meet statutory requirements

On March 2, 2006, the U.S. District Court for the Eastern District of New York dismissed claims brought under the Torture Victim Protection Act by Maher Arar against former Attorney General John Ashcroft and other U.S. officials for alleged detention and torture by Syrian officials. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). The court explained as excerpted briefly below.

---

* * * *

Plaintiff Maher Arar brings this action against defendants, U.S. officials, who allegedly held him virtually incommunicado for thirteen days at the U.S. border and then ordered his removal to Syria for the express purpose of detention and interrogation under torture by Syrian officials. He brings claims under the Torture Victim Prevention Act and the Fifth Amendment to the U.S. Constitution.

* * * *

The Torture Victim Protection Act "executes" in part the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 (1984), 23 I.L.M. 1027, to which the Senate gave its consent on October 27, 1990. S. Treaty Doc. No. 100-20, 136 Cong. Rec. D 1442 (1990). In addition to enacting the Torture Victim Protection Act and creating a private cause of action for officially sanctioned torture, Congress implemented Article 3 of

the CAT by enacting the Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

* * * *

The Torture Victim Protection Act makes clear that individuals are liable only if they have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). The Second Circuit has held that the "color of law" requirement of the TVPA is "intended to 'make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Kadic v. Karadzic,* 70 F.3d 232, 245 (2d Cir. 1995) (citing TVPA House Report, at*5). Plaintiff argues that [U.S. officials] defendants operated under color of law of a foreign nation by conspiring with, or aiding and abetting, Syrian officials in their unlawful detention and torture of Arar.

Defendants argue that they cannot be held liable under the Torture Victim Protection Act because any "law" under which they were acting in this case would be domestic—not foreign—and, therefore, the language in the Torture Victim Protection Act regarding "color of law[] of any foreign nation" does not apply to them.

* * * *

The decision by Congress not to provide a private cause of action under FARRA for individuals improperly removed to countries practicing torture militates against creating one in this case under the Torture Victim Protection Act. Moreover, the color of "foreign law" requirement, combined with the intent by Congress to use the Torture Victim Protection Act as a remedy for U.S. citizens subjected to torts committed overseas, strongly supports defendants' claim that the Torture Victim Protection Act does not apply here. In conclusion, plaintiff does not meet the statutory requirements of the Torture Victim Protection Act, and, accordingly, Count 1 of the complaint is dismissed.

* * * *

J. RULE OF LAW AND DEMOCRACY PROMOTION

On September 21, 2006, Velia M. DePirro, U.S. Mission Alternate Representative, addressed the Human Rights Council on topics including the Report of the Special Rapporteur on Freedom of Opinion and Expression, as excerpted below. The full text is available at *www.usmission.ch/HRUpdates/0921DePirroFreedomReligion.html*.

---

* * * *

My delegation . . . welcomes the report of the Special Rapporteur on the Freedom of Opinion and Expression, Mr. Ambeyi Ligabo.

This [is] another example of a mandate that my Government considers essential.

We are gratified that the Special Rapporteur focused on the urgent need for security and protection of media professionals.

As Secretary of State Condoleezza Rice said on the occasion of this year's commemoration of World Press Freedom Day, we hail the courageous sacrifices made by journalists around the world to report the facts, even at the cost of their lives and their freedom.

In some countries, media professionals face crackdowns on press freedoms, including tightening libel laws, a concentration of media ownership, diminishing independent press outlets, and restricted Internet search engines.

In particular, we oppose the efforts of non-democratic governments to misuse the Internet to restrict freedom of expression or to track and prosecute dissidents.

We also urge other players, such as NGOs and especially the Internet industry, to take voluntary action to ensure that, as they spread the availability of the Internet around the world, they also take care to minimize its abuse as a means of political repression.

On September 26, 2006, Ambassador Tichenor addressed the HRC on the report of the special rapporteur on Cambodia, as excerpted below. The full text of Ambassador Tichenor's statement is available at *www.usmission.ch/Press2006/0927-26statements.html*.

The United States welcomes the opportunity to respond to Mr. Ghai's first report.

The United States is encouraged by improvements to the democratic political climate over the past year, including actions taken by the Royal Cambodian Government to restore parliamentary immunity to Sam Rainsy and two other opposition party members of Parliament, as well as to abolish criminal defamation from the Criminal Code.

However, the United States remains concerned about rule of law, property rights issues, and corruption, and urges progress in these areas.

The United States supports the efforts of the Special Representative and encourages the Royal Cambodian Government to cooperate closely with him. The United States supports keeping the UN Human Rights Office in Phnom Penh at least until the 2008 elections have concluded.

K. HUMAN RIGHTS AND COUNTER-TERRORISM

On September 25, 2006, Alternate U.S. Representative Judith A. Chammas addressed the Human Rights Council on the report of the special rapporteur on the promotion and protection of human rights while countering terrorism. Excerpts from Ms. Chammas' remarks follow. The full text is available at *www. usmission.ch/HRUpdates/0925JudithChammas.htm.*

* * * *

While we all agree that a strong response to those who commit acts of terrorist violence is imperative, in doing so all governments must fully respect their obligations under international law, keeping in mind the imperative to ensure that the rule of law and democratic principles are respected.

Like the Special Rapporteur, the United States notes with concern actions by some countries to justify on grounds of combating terrorism repressive internal measures to restrict human rights and fundamental freedoms.

We also agree with the Special Rapporteur that when countries bring criminal charges against individuals for terrorist acts, or other crimes in their domestic courts they must do so in accordance with due process of law and other safeguards reflected in the International Covenant on Civil and Political Rights and other applicable human rights instruments.

Precisely because we strongly support effective work by the Special Rapporteur, we wonder whether certain areas he suggests are sufficiently central to this mandate or likely to lead to productive results to justify precious time and resources spent on them.

One example is the exceptionally difficult and controversial undertaking of developing a single definition of terrorism. How would the Special Rapporteur propose to avoid a rehash of the literally thousands of hours of debates that have impeded other efforts to develop such a definition?

Another example is exploring the "root causes" or "conditions conducive to terrorism." While these are, of course, very important issues, they are far from the heart of this mandate and would be a distraction from the important work to be done within it. Again, what would the Special Rapporteur suggest to avoid a loss of focus in this area?

* * * *

Cross References

Refugee and asylum issues, **Chapter 1.D.**
Trafficking in persons, **Chapter 3.B.4.**
International criminal tribunals and related issues, **Chapter 3.C.**
Immunity of foreign officials in ATS and TVPA suits, **Chapter 10.A.2. and C.3.**
Global Internet Freedom Task Force, **Chapter 11.E.1.**
Forum non conveniens considerations in ATS cases, **Chapter 15.C.2.**
Peace Process and related issues, **Chapter 17.A.**
Human rights and law of war, **Chapter 18.A.1. and 4.a. and b.**

06-Cummins-Chap06.indd 488 10/22/07 11:40:37 PM

Chapter 7

International Organizations

A. UNITED NATIONS: SECURITY COUNCIL

1. Reform

On July 21, 2006, Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, addressed the UN General Assembly on the issue of Security Council reform and expansion. The substantive paragraphs of Ambassador Bolton's statement are set forth below; the full text is available at *www.un.int/usa/06_181.htm*.

---

* * * *

The United States supports expansion of the Security Council, but expansion must be for more than simply expansion's sake. Changes should be designed to increase the effectiveness of the Council in responding to the challenges we face today.

A look at the Council's agenda over the past weeks makes clear the importance to all Member States of a Security Council that is able to respond swiftly, credibly, and effectively to threats to international peace and security.

At a very practical level, one reason the Council is able to function efficiently is that its size permits useful and manageable discussions and debates. All Council members are able to engage in debate over the course of a morning or afternoon. Resolutions can be worked through line by line within a time frame that allows all

07-Cummins-Chap07.indd 489 10/22/07 11:41:11 PM

members to express their views. This procedure is more complex and time consuming in UN bodies with a larger membership.

Expansion of the Security Council must result in at least maintaining—if not increasing—its effectiveness.

We believe the Council would be more effective if Japan—the second largest financial contributor to the UN, a strong and vibrant democracy, a defender of human rights, and a lead[] contributor to peacekeeping operations and development worldwide—were a permanent member of the Council.

Over the past year, we do not believe the current proposals before the General Assembly have [gained] the broad-based support required for adoption and ratification as a UN Charter amendment. The time and energy expended []on this issue over the past year has only hardened positions and increased divisions among members. We are no closer today than we were a year ago to achieving the broad consensus necessary to adopt and ratify a UN Charter amendment.

Thus, the [time] may be right to move beyond these stalemated proposals. To get to a model for expansion that command[s] the broad support necessary, some of the key actors in the current debate will have to find new ways of looking at the issue.

As to the Security Council's working methods, the United States believes strongly that a number of changes are needed to improve the effectiveness and the efficiency of the Council's work. The Charter gives the Security Council sole authority over its own working methods.

During the past year, the Council has re-energize[d] its working group on documentation and other procedural questions to address the issue of the Council's working methods. . . . Earlier this week, the Council adopted a series of practices to make the Council's work more transparent. We will continue to participate fully and support the ongoing efforts of the Working Group in the coming months.

2. Jurisdiction

See Chapter 17.A.6. concerning placement of Burma on the Security Council agenda.

B. OTHER ISSUES

1. Responsibility of International Organizations

On October 30, 2006, Elizabeth Wilcox, Deputy Legal Advisor, U.S. Mission to the United Nations, addressed the Sixth Committee on the International Law Commission Report on the issue of responsibility of international organizations. The full text of Ms. Wilcox's statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

* * * *

. . . On this topic we . . . note that our comments are preliminary, as we plan to continue our review and look forward to considering the views of other governments, including those presented at this meeting.

We continue to appreciate the desire to generate a common set of articles on the responsibility of international organizations, and the inherent challenges in doing so.

We remain concerned, however, with the underlying assumption that guides work in this area—that the draft articles on State Responsibility serve as the appropriate model for international organizations. Unlike states, which can be seen to share a fundamental set of qualities, there is great diversity in the structure, functions, and interests of international organizations. In addition, many of the interests and relationships of states that underpin the draft articles of State Responsibility—such as those related to sovereignty, citizenship, and territorial integrity—either do not exist or do not exist in a parallel form in international organizations. These differences make transposing the articles on State Responsibility to international organizations problematic.

We have previously indicated our view that the first 17 draft articles brought some of these problems to light, and we see similar problems in the work of the Commission on Articles 17 to 30. For example, we see problems in translating the principle of "necessity" to international organizations. The justification for "necessity" in the articles on State Responsibility is grounded in

state interests—such as interests related to citizens or territory—that are not easily adaptable to international organizations. The draft article nevertheless suggests that necessity may apply to international organizations acting to safeguard "an essential interest that the organization has the function to protect." This is a vague and potentially expansive standard, and it is not at this point clear to us that there exists any such principle that is applicable generally to international organizations.

As another example, we see principles involving resort to force in self-defense operating differently with respect to international organizations than they operate with respect to states. International organizations are in large measure creatures of the states that constitute them, and do not share the same interests in protecting nationals and national sovereignty as states. While they may have a legitimate need to defend themselves in certain situations, we do not see such a right as a principle of general relevance to all international organizations, and any such right would not appear to have the same scope as the right of states to protect their national territory and sovereignty.

We do recognize that this is a challenging topic and thank the Commission for its efforts so far. As the Commission continues its work, however, we would encourage it to focus particular attention on problems that arise in the existing practice of international organizations. Further consideration of these articles could benefit from practical examples that illustrate their application and their relevance.

Finally, while reserving our right to provide further comments in due course, we would like at this time to comment on one of the questions—in paragraph 28(a) of the Commission's report—in which the Commission has indicated a particular interest in the views of governments. We do not believe that members of an international organization have a general obligation to provide compensation for internationally wrongful acts of that organization for which the state is not responsible. In this connection, we believe the Commission should be cautious about elaborating principles that might serve as a disincentive for states to participate in and contribute to the work of international organizations.

2. International Coffee Organization Reforms

The Office of the U.S. Trade Representative issued a press release on May 22, 2006, announcing that the United States was proposing wide-ranging reforms to the International Coffee Organization ("ICO") "aimed at strengthening the ICO's contributions to the world coffee economy." The full text of the press release, excerpted below, is available at *www.ustr.gov/Document_Library/Press_Releases/2006/May/Section_Index.html*. The full text of the U.S. proposal is available at *www.ustr.gov/assets/Trade_Sectors/Environment/asset_upload_file590_9459.pdf*.

* * * *

These reforms are being proposed just one year after the United States rejoined the ICO, which is an intergovernmental body whose members account for more than 97 percent of world coffee production and 80 percent of coffee consumption. The United States was instrumental in creating the ICO in 1962, but left the organization in 1993.

The U.S.-proposed reforms seek to create new roles for the ICO that can provide benefits to all stakeholders and guide the ICO away from its historic use of market interventions in the coffee sector.

"When the United States rejoined the ICO in 2005, we recognized the organization's potential, but we also saw the need for change" said U.S. Trade Representative Rob Portman. "We are seeking to build on the ICO's strengths. We have proposed structural and functional reforms that will improve the efficiency and effectiveness of the ICO. The expiration of the current agreement [International Coffee Agreement] in 2007 presents an opportunity for the members to take action in order to reform the organization so that it can make a real difference."

The U.S.-proposed reforms were presented as broad themes and include: expanding the organization's objectives to promote a comprehensive approach to sustainability, including environmental

sustainability; streamlining the ICO's structure and operations; expanding and enhancing the collection and dissemination of information relevant to coffee farmers, especially small producers; strengthening the contributions of the private sector; highlighting the importance and effectiveness of capacity building projects; assisting small producers in managing the consequences of unpredictable market conditions; and making the organization more accessible and attractive to civil society groups.

3. International Mobile Satellite Organization: Amendment Concerning Function

The International Mobile Satellite Organization ("IMSO" or "Organization") General Assembly met in London in its eighteenth session from September 25-29, 2006. Among other things, the assembly adopted an amendment to the IMSO Convention regarding Long Range Identification and Tracking of Ships as part of agenda item 4. The amendment, which would be a new article 3*bis* to the IMSO Convention, provides:

> Subject to the decision of the Assembly, the Organization may assume functions and/or duties as Co-ordinator of the Long Range Identification and Tracking of Ships (LRIT), at no cost to Parties, in accordance with the decisions of the International Maritime Organization.

The United States disassociated itself from the adoption of the amendment, providing an explanation of its view that the amendment was inappropriate and inadequate for the intended purpose, as excerpted below. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

Like other Parties participating in the Eighteenth session of the IMSO Assembly, we are strongly committed to the Long Range Identification and Tracking (LRIT) program established by the International Maritime Organization (IMO) in SOLAS V/Regulation 19-1, and

are as aware as other Parties of the aggressive timeframe established in that regulation for system implementation.

The Assembly's decision to adopt an amendment related to LRIT at this session may lend the appearance that the IMSO has made substantial progress towards being one potential candidate for the IMO to select as "LRIT Coordinator". However, the reality is that the amendment that was adopted is seriously flawed, and that an extensive set of further amendments would need to be considered, adopted and subjected to procedures for their entry into force before the IMSO would be able effectively to take on any duties as the LRIT Coordinator.

The amendment that was adopted is at variance with normal form for language establishing the purpose of an intergovernmental organization. It would make the functions and duties of the IMSO subservient to the decisions of an entirely different international organization, including decisions not yet fully formulated. It also would make those functions and duties contingent simply on decisions of the IMSO Assembly, which is constituted to carry out the IMSO's purpose, not modify it. This flawed language, in both respects, could have the effect of undermining the deliberately created amendment procedures of Article 18 that protect IMSO Party governments from the functions of the organization being changed absent formal and proper acceptance by the required number of governments. Under the terms of the amendment that was passed, the functions of the IMSO could expand based on decisions of a separate international organization, subject merely to an Assembly vote. The United States of America finds this very troubling.

As to the matter of substance, the United States of America does not object to the IMSO being considered as one candidate for the role of LRIT Coordinator. However, the extensive amendments that would be required to specify the respective functions of the constituent organs of the IMSO, the manner of financing any new functions, and the essential accounting controls for new activities, have not been drafted, much less made available for consideration by the IMSO Parties.

* * * *

The U.S. delegation was supportive of the process developed by the Drafting Group during the Assembly, and the United States of America remains ready to meet at the earliest opportunities to review the situation and aid in new work that may enable the IMSO to be considered as one candidate for LRIT Coordinator within the anticipated LRIT implementation timeframe.

Similarly, the United States joined with Canada, Colombia, and the Russian Federation in a statement objecting to amendments to the IMSO Convention, also adopted in agenda item 4, related to Global Maritime Distress and Safety System ("GMDSS"). The joint statement is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

Like other Parties participating in the Eighteenth session of the IMSO Assembly, we are strongly committed to an augmentation of the Global Maritime Distress and Safety System (GMDSS) through the introduction of new satellite service providers. This should be done as rapidly as possible.

The Assembly's decision to adopt amendments at this session may lend the appearance that progress has been made toward this goal. However, the reality is that further amendments are likely to be necessary before the IMSO can undertake any functions in support of GMDSS augmentation Additionally, all such amendments will need to be brought into force through appropriate procedures.

At the Seventeenth session of the Assembly when the draft amendments were first examined, we expressed concern in a written statement that matters directly affecting the preparation of amendment text were still outstanding and would need to be completed before proper amendment text could be finalized and adopted. These included final decisions of the International Maritime Organization on its Resolution A.888(21) criteria for recognizing new participants in the GMDSS, completion of an agreed "reference" Public Services Agreement that new participants would be required to sign, and preparation of a legal opinion analyzing the interaction of the relevant legal instruments of the IMSO and the IMO. Additionally, the IMO's Maritime Safety

Committee will for the first time review needed amendment of Chapter IV of the Safety of Life at Sea Convention later this year. As this is work still in progress, the amendments that have been adopted at the Eighteenth session of the Assembly may need to be made consistent with those efforts currently under way.

It is for this reason that the proposed amendments to the Convention are not ready for adoption at this time and therefore we do not agree with the decision of the Assembly.

We remain ready to meet at the earliest opportunities to aid in completing the necessary work and finalizing amendment proposals that will be consistent with related decisions, texts and legal obligations of IMSO and IMO.

> At the 82nd session of the Maritime Safety Committee from November 29-December 8, 2006, the MSC appointed the International Mobile Satellite Organization ("IMSO") as the LRIT Co-ordinator and invited IMSO to undertake the oversight of future satellite service providers in the global maritime distress and safety system (GMDSS), explaining:
>
> > In essence, the MSC would determine the criteria, procedures and arrangements for evaluating and recognizing satellite services for participation in the GMDSS, while services recognized by the Committee would be subject to oversight by IMSO.
>
> The report of the MSC 82nd session is available at *www.imo.org.*

Cross References

Establishment of UN Human Rights Council, **Chapter 6.A.2.**
Amendments to the Constitution and Convention of the International Telecommunication Union, **Chapters 10.D.1. and 11.E.2.**

Chapter 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

1. Diplomatic Protection

On October 25, 2006, John B. Bellinger, III, Legal Adviser of the Department of State, addressed the UN General Assembly Sixth Committee on the International Law Commission Report of its 58th Session. Excerpts follow on the topic "Diplomatic Protection." The full text of Mr. Bellinger's statement is available at *www.state.gov/s/l/c8183.htm*; *see also* Chapter 13.A.1.C.(1) for Mr. Bellinger's comments on transboundary harm arising out of hazardous activities.

* * * *

With respect to the Commission's work on Diplomatic Protection, the revised articles and commentaries on Diplomatic Protection represent a significant contribution for which all participants in the process, past and present should be commended. . . .

Initially, I would like to make two procedural comments. First, the United States does not believe that it would be advisable to attempt to adopt a binding instrument on this topic. On only a limited set of issues do the draft articles deviate from settled customary international law and it is doubtful that those limited issues warrant the expense and other requirements of an international conference. Second, the Commission adopted the draft articles and

08-Cummins-Chap08.indd 499 10/22/07 11:41:47 PM

commentaries this year, and they have only become available recently. Because of the number of issues addressed in the draft articles and commentaries, the volume of the commentaries, and the limited time governments have had to review them, our government will want to study them carefully. Our view is that, at this session, the General Assembly, in its resolution dealing with the ILC report, should thank the Commission for completing its work on this matter, note the receipt of the draft articles and commentaries, and recommend that governments study them carefully.

I would now like to give the views of the United States on a number of aspects of the draft articles and commentaries. Because we plan to continue our review of the commentaries, and look forward to considering the views of other governments as well, my comments on them will only be preliminary.

The United States welcomes the changes the Commission made over the past year to a number of the provisions in preliminary drafts of the articles to reflect customary international law more accurately. We also welcome the commentary's clarifications that certain articles represent progressive development of the law. We think it is useful that paragraph 8 of the commentary on article 1 makes clear that diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action. We are pleased that paragraph 2 of the commentary to article 2 reaffirms that a State is under no obligation to exercise diplomatic protection, since the question of whether to espouse claims formally is a sovereign prerogative, the exercise of which necessarily implicates other considerations of national interest.

We are also pleased that the draft articles honor the established principle of continuity of nationality as a prerequisite to the exercise of diplomatic protection on behalf of natural and corporate persons in articles 5 and 10 and, by implication, in articles 7 and 8. We believe, though, that these articles inappropriately diverge from customary international law in not extending that requirement beyond the date of official presentation of the claim to the

date of resolution, except in cases where, subsequent to presentation, the injured person acquires the nationality of the respondent State or, as stated in the commentary, acquires the nationality of a third State in bad faith. In our view, the customary international law rule is that reflected in the clear record of State practice and in the most recent articulation of the rule that appears in the award of the arbitral tribunal in the case of *The Loewen Group Inc. v. United States of America*.* As the Tribunal in that case stated, "[i]n international law parlance, there must be a continuous national identity from the date of the events giving rise to the claim . . . through the date of the resolution of the claim. . . ." We believe the draft articles inappropriately deviate from customary international law in other respects as well, as we have previously observed in written comments and will detail further in the future.

We welcome article 12's restatement of the customary international law rule that a State of nationality of shareholders can exercise diplomatic protection on their behalf when they have suffered *direct* losses. We do not believe, however, that draft article 11's two exceptions to the rule that preclude the diplomatic protection of shareholders with respect to an injury to the corporation reflect customary international law. We note that the International Court of Justice left these questions undecided in its Judgment of February 5, 1970, in the *Barcelona Traction* case, since the circumstances for their consideration did not arise in the case. Moreover, the *Case Concerning Elettronica Sicula, S.p.A. (ELSI)* involved only claims of direct injury to the shareholders and thus cannot be read to support these exceptions.

We also welcome article 14's reaffirmation that a State may not present an international claim before the injured person has exhausted all local remedies. Paragraph 14 of the commentary makes clear that this does not preclude the possibility that the exhaustion of local remedies may result from the fact that another

* Editor's note: The June 26, 2003, arbitral award in *Loewen* is available at *www.state.gov/documents/organization/22094.pdf; see also Digest 2003* at 610-15 and *Digest 2002* at 623-42.

person has submitted the substance of the same claim to a court of the respondent State. The United States has taken the position that under customary international law local remedies do not have to be exhausted where the local remedies are obviously futile or manifestly ineffective. We are pleased that, while article 15(a) states the proposition somewhat differently, paragraph 4 of the commentary makes clear that neither a low possibility of success nor the difficulties and costs of further appeals are sufficient, and that the test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.

* * * *

2. U.S.-Albania Claims Settlement Agreement

On March 10, 1995, the United States and Albania reached agreement on a lump sum settlement of all outstanding U.S. expropriation claims against Albania arising from actions taken at the end of World War II. Agreement Between the Government of the United States of America and the Government of the Republic of Albania on the Settlement of Certain Outstanding Claims, reprinted at 34 I.L.M. 597 (1995). *See Cumulative Digest 1991-1999* at 1076-81.

Due to concern that the claimant pool would be too large for the $2 million settlement amount, the 1995 agreement limited eligibility of dual U.S.-Albanian nationals to those that were either domiciled in the United States at the time the agreement was concluded or for half the period of time between when the property was taken and the date of entry into force of the agreement. Dual nationals not eligible under this program retained rights to pursue remedies under domestic Albanian law. In 2005 the Foreign Claims Settlement Commission determined that it had adjudicated most of the eligible claims and expected $1.2 million to remain in the settlement fund. Therefore, the United States proposed to the Government of Albania that the claims settlement agreement

be amended to remove the domicile requirement for U.S.-Albanian nationals. Following discussions with the Albanian government, on November 18, 2005, the U.S Embassy in Tirana presented a diplomatic note, the substantive paragraphs of which are set forth below.

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Republic of Albania and has the honor to refer the Ministry to the Agreement Between the Government of the United States of America and the Government of the Republic of Albania on the Settlement of Certain Outstanding Claims signed March 10, 1995 and to paragraph 1 of the Agreed Minute to the Agreement, which reads as follows:

> For purposes of article 1, the term "United States nationals" shall include dual United States-Albanian nationals only if those nationals are domiciled in the United States currently or for at least half the period of time between when the property was taken and the date of entry into force of the agreement.

The Embassy also has the honor to refer to discussions between representatives of our two governments that have concluded that this provision of the Agreed Minute is no longer necessary. Therefore, the Embassy proposes that the Agreement be amended by deleting paragraph 1 of the Agreed Minute in its entirety and renumbering the remaining paragraphs accordingly.

If the foregoing proposal is acceptable to the Government of the Republic of Albania, the Embassy proposes that this note and the Ministry's affirmative note in reply shall constitute an agreement, which shall enter into force on the date of your note in reply.

On April 27, 2006, the Albanian Ministry of Foreign Affairs responded with a diplomatic note agreeing with the proposed amendment. The amendment therefore entered into force on that date.

B. CLAIMS OF INDIVIDUALS

1. Nazi Era Claims

a. Freund v. France

On June 29, 2006, the United States filed a Statement of Interest in the U.S. District Court for the Southern District of New York recommending dismissal on any valid legal ground of plaintiffs' claims against the Caisse Des Dépôts et Consignations ("CDC") for its receipt of stolen assets taken from Jews and others in the course of their arrest, imprisonment, and deportation in France during World War II. *Freund v. France*, *06 CV 1637 (KMK)* (S.D.N.Y.). In 2001 the United States and France entered into an executive agreement concerning, among other things, the creation of a fund to make payments to individuals who suffered losses related to banking assets in France during the Holocaust. Pursuant to that agreement, the United States advised the Court of the U.S. foreign policy interest in the French fund and a French commission established to address Holocaust-era claims being treated as the exclusive remedies for Holocaust-related claims against banks active in France during World War II. For additional information on the agreement and the text of the 2001 Declaration of Stuart E. Eizenstat referred to in the Statement, *see Digest 2001* at 406-13. The case was pending at the close of 2006.

Excerpts follow from the U.S. Statement of Interest, available in full at *www.state.gov/s/l/c8183.htm*.

---

* * * *

It would be in the foreign policy interests of the United States for the Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation ("CIVS"), the Fund, and the Foundation to be the exclusive fora and remedies for the resolution of all claims asserted against banks arising from their activities in France

08-Cummins-Chap08.indd 504 10/22/07 11:41:48 PM

during World War II, including without limitation those relating to spoliation of assets confiscated from deportees and internees. *See* Eizenstat Decl. ¶ 29 and Exh. B at Art. 1(1). Accordingly, the United States believes that all claims asserted against the CDC should be pursued through the CIVS instead of the courts. The United States' interests in supporting the CIVS, the Fund, and the Foundation are explained below.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Eizenstat Decl. ¶ 30. As of 2001, over one hundred thousand Holocaust survivors, including many who emigrated from France, lived in the United States. *Id*. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.

The CIVS, the Fund, and the Foundation are an excellent example of how such cooperation can lead to a positive result. These fora have provided benefits to more victims, faster and with less uncertainty, than would litigation, with its attendant delays, uncertainty, and legal hurdles. Moreover, the CIVS and the Fund employ standards of proof that are far more relaxed than would be the case with litigation. Litigation, even if successful, could only benefit those able to make out a claim against a bank over which they could obtain jurisdiction in the United States. By contrast, the CIVS, the Fund, and the Foundation will benefit all those with claims against banks that were active in France during World War II, regardless of whether such banks are still in existence today. The creation of the Fund by the banks, the commitment by the banks to pay all awards recommended by the CIVS, and the participation in the Foundation not only by the banks but by the Government of France and other financial institutions, allow comprehensive relief for a broader class of victims than would be possible in United States judicial proceedings. Eizenstat Decl. ¶ 31. In addition, the Foundation is dedicated in part to important efforts to ensure that crimes like those perpetrated during the Nazi era never happen again. *Id*. ¶ 32.

Second, establishment of the Fund, and recognition of the CIVS and the Foundation, helps further the close cooperation between

the United States and its important European ally and economic partner, France. One of the reasons the United States took an active role in facilitating a resolution of the issues raised in this litigation is that the United States Government was asked by the French Government to work as a partner with it in helping to make its efforts a success. French-American cooperation on these issues has helped solidify the ties between our two countries, ties which are central to U.S. interests in Europe and the world. *Id.* ¶ 34.

France is our oldest ally, and remains a valuable partner. U.S.-French cooperation on a range of foreign and security policy challenges is now better than it has been in years. The U.S. and France are leading international efforts to end Syrian domination of Lebanon and are working in concert to address the Iranian nuclear threat. France plays a critical role in the stabilization of Afghanistan, where its forces have worked alongside the U.S. since 2002. Multilaterally, France cooperates actively with the U.S. in the United Nations, as a NATO ally, and through the European Union.

Third, dismissal of the claims against CDC would be in the foreign policy interests of the United States. The alternative would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority of survivors. *Id.* ¶ 36. In addition, ongoing litigation could lead to conflict among survivors' organizations and between survivors and the banks, conflicts into which the United States and French Governments would inevitably be drawn.

Dismissal of all pending litigation in the United States in which Holocaust-related claims are asserted against banks relating to their activities in France during World War II was accepted by all as a precondition to allowing the Fund to make payments to victims. The United States strongly supports the CIVS and the Fund and the benefits those institutions have been able to provide. Therefore, in the context of the Fund, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all Holocaust-related claims against the banks. *Id.* ¶ 37. See also Executive Agreement (Eizenstat Decl. Exh. B) at Art. 1(1).

Fourth, and finally, the Fund, the CIVS, and the Foundation are a fulfillment of a half-century effort to complete the task of

bringing justice to victims of the Nazi era. Since the liberation of France in 1944, France has made compensation and reconciliation for wrongs committed during the occupation and Vichy regime an important part of its political agenda. Although no amount of money will ever be enough to make up for all Nazi-era crimes, the French Government has over time created significant compensation and restitution programs for Nazi-era acts. The Fund and the Foundation added another $400 million to that total, over and above the total amount of claims ultimately paid through the CIVS, and complement these prior programs. *Id.* ¶ 38.

The United States does not suggest that these policy interests described above in themselves provide an independent legal basis for dismissal. Moreover, in this Statement, the United States takes no position on the merits of the underlying legal claims or arguments advanced by plaintiffs or defendants. Because of the United States' strong interests in the success of the CIVS, the Foundation, and the Fund, however, the United States recommends dismissal on any valid legal ground.

* * * *

b. Gross v. German Foundation Industrial Initiative

On August 3, 2006, the U.S. Court of Appeals for the Third Circuit found that the claims of beneficiaries of the German Foundation "Remembrance, Responsibility, and the Future" ("Foundation") for interest owed on German company contributions to the Foundation did not present a nonjusticiable question. *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d. Cir. 2006). Plaintiffs alleged that the German Foundation Industrial Initiative, an association of seventeen major German corporations who agreed to fund the Foundation in exchange for "legal peace," owed interest on company contributions as called for in a Joint Statement issued on July 17, 2000, at the conclusion of negotiations to establish the Foundation. As explained by the Third Circuit:

> . . . The Joint Statement commits the German government and German industry to a DM 10 billion capitalization,

and places responsibility for collecting the German companies' share on the German Foundation Industrial Initiative. Particularly significant for this case, Section 4(d) of the Joint Statement provides, in part:

> German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM

Reversing the decision of the U.S. District Court for the District of New Jersey, the Court of Appeals found that the interest dispute was significantly different from cases that had been dismissed in U.S. courts under the political question doctrine, noting that it was a suit to enforce an alleged contract for interest and not a claim for reparations. Central to its analysis was the fact that the United States had not filed a Statement of Interest. The Third Circuit further held that neither the act of state doctrine nor the doctrine of international comity, issues that the district court did not reach, precluded adjudication of the dispute.

Excerpts follow from the court's discussion of the import of the absence of a U.S. Statement of Interest and its conclusion that the claims in the case were justiciable (footnotes omitted). For further information on the Foundation and the Joint Statement, *see Digest 2000* at 446-50, with full text of the documents available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As a general matter, the conduct of foreign relations is constitutionally committed primarily to the Executive Branch. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976). . . .

But the Court has cautioned that not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211. . . .

In determining the presence or absence of a nonjusticiable political question, whether or not foreign relations are implicated, we consider six factors articulated by the Court in *Baker v. Carr* [369 U.S. 186, 217 (1962)]. . . .

Each of [the] factors "has one or more elements which identify it as essentially a function of the separation of powers." *Id*. A finding of any one of the six factors indicates the presence of a political question. *See INS v. Chadha*, 462 U.S. 919, 941 (1983). Should a factor be present, a holding of nonjusticiability still depends on whether the factor is "inextricable from the case at bar." *Baker*, 369 U.S. at 217. Aware that "the 'political question' label" can "obscure the need for case by case inquiry," *id*. at 210–11, we necessarily avoid "resolution by any semantic cataloguing," *id*. at 217. Instead, we undertake a "discriminating inquiry into the precise facts and posture of the particular case." *Id*.

* * * *

We believe the present dispute raises issues that are significantly different from those in cases that have been dismissed from United States courts under the political question doctrine. It is true that a judgment for the claimants would require payment to the Foundation, translating to increased payments to victims. But there is a difference between a suit for reparations and a suit to enforce an alleged contract for "interest." As the District Court recognized, "the core issue is not whether restitution is proper, but how much restitution, namely in the form of interest, was agreed upon." *Gross*, 320 F. Supp. 2d at 252. The District Court concluded nonetheless that the "interest" dispute could not be separated from prior nonjusticiable reparations claims. But the present dispute is not over a reparations claim, but over a specific "interest" provision in a recently negotiated document. This distinction removes the dispute from the history of the underlying claims and distinguishes it from other cases dismissed by United States courts.

Were the "interest" dispute inextricable from the long history of Executive management, we would expect some communication

from the United States Executive—direct Executive intervention, a Statement of Interest under the Executive Agreement, a statutory statement of interest under 28 U.S.C. § 517, a letter to the court, or any other way in which the United States Executive can make its interests known to a court. . . .

Were the "interest" dispute inextricable from the history of judicial noninvolvement in reparations cases, we would also expect ongoing diplomacy to resolve the issue. . . . There has been no representation that the United States government is engaged in any form of diplomacy or negotiations regarding the payment of additional "interest."

* * * *

Under the facts of this dispute, we do not think the United States was obligated by any provision of the [documents establishing the Foundation, collectively referred to as the Berlin Accords] to file the Statement of Interest as set forth in Annex B of the Executive Agreement. In the Executive Agreement, the United States promised it would file a Statement of Interest in a certain set of cases:

> The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

Executive Agreement, Art. 2(a). Article1(1), in turn, describes the covered claims as ". . . all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." This is the same standard by which the United States and Germany would decide the class of claims for which the Foundation would be the "exclusive remedy and forum."

Art. 1(1); *see also* Joint Statement, Preamble, para. 14 ("exclusive remedy and forum").

The definition of claims that "arise from" WWII and the National Socialist era . . . should include those claims the Berlin Accords were organized to dismiss . . . In the context of "exclusive remedy and forum," the District Court recognized that these restitution and reparations claims differed from the present "interest" dispute. *See Gross*, 320 F. Supp. 2d at 248-49. The District Court discussed the "arising from" definition at length, concluding the Foundation was not the exclusive forum for the "interest" dispute. *See id*.

The United States' commitment to file a Statement of Interest and the exclusive jurisdiction of the Foundation turn on the definition of the same phrase: "arising out of the National Socialist era and World War II." Interpreting this phrase consistently in both instances, we conclude the claim for additional "interest" does not trigger the United States' obligation to file an Annex B Statement of Interest in certain cases.

When filed, the Statement of Interest outlined in the Berlin Accords explains that because of foreign policy interests, the United States Executive prefers dismissal and resolution through the Foundation. Annex B to the Executive Agreement further describes the types of cases for which the Foundation shall be the exclusive forum:

> [T]he President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to slave and forced labor, aryanization, medical experimentation, children's homes/ Kinderheim, other cases of personal injury and damage to or loss of property, including banking assets and insurance policies.

The language supports the view that the claims for which the Foundation is the exclusive forum and remedy, and for which

the United States is required file a Statement of Interest, are reparations and restitution cases, and not the present "interest" dispute.

* * * *

We look to other potential indications and expressions of the United States Executive's interest, the most obvious being the Armitage letter.* But for several reasons, we conclude the Armitage letter does not constitute a policy determination by the United States Executive, or an authoritative expression of Executive interest, to which we should defer. The Armitage letter is directed to Otto Lambsdorff, the Vice Chairman of the Foundation's Board of Trustees. It is not directed to the United States court adjudicating the "interest" dispute, or to any court for that matter. The letter states the proper forum for resolution of the "interest" dispute is political and diplomatic, not legal. But it explicitly leaves open the merits question, stating "[t]he U.S. Government has no independent information that conclusively resolves disagreements surrounding the interest issue." Furthermore, the letter fails to declare the United States Executive will seek intervention or dismissal.

* * * *

The final issue we address before analyzing the "interest" dispute under the *Baker* factors is the parties' characterizations of the Joint Statement—the document giving rise to the claim that additional "interest" is due. Claimants ask us to view the Joint Statement as a contractual settlement agreement. They note the resulting arrangement bears the hallmarks of an enforceable contract, with parties exchanging promises and taking action to their detriment in reliance on those promises. They contend plaintiffs in pending cases would never have agreed to the dismissal of their cases with prejudice without a contractual obligation on the part of the German government and industry to fund the Foundation pursuant to the Joint Statement. They contend the language of Section 4(d) reads like a contract between private parties, even if other portions of the document contain precatory and diplomatic language.

---

* Editor's note: The referenced letter from Deputy Secretary of State Richard Armitage is reprinted in full at *Gross*, 456 F.3d at 373.

The German Foundation Industrial Initiative asks us to read the Joint Statement like a political statement, containing diplomatic commitments and memorializing negotiations among sovereign states. The German Foundation Industrial Initiative notes that the arrangement between the private litigants and the German government and industry would never have been possible without the high-level diplomatic efforts of the governments of several nations.

We recognize there is much to support the view of the German Foundation Industrial Initiative that the Joint Statement is a political document. The German Foundation Industrial Initiative cites Ronald J. Bettauer, Deputy Legal Adviser in the United States State Department, who participated in the negotiations between the United States and German governments culminating in the Berlin Accords. He characterized the Joint Statement as follows:

> As the negotiations came to a conclusion, we needed a document indicating what further steps it was agreed each participant would take. It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states. We therefore developed a document that set forth political rather than legal commitments—that is, undertakings that various participants "will" take various steps, rather than legal commitments that they "shall" do so. At this phase, we were once again involved in a negotiation with all the participants on the text of what became the "joint statement." This document set forth the undertakings of each party as to the steps it would take. This final aspect of the arrangement was more akin to a resolution that an international organization adopts. But this was not a negotiation in an international organization.

Ronald J. Bettauer, Keynote Address—The Role of the United States Government in Recent Holocaust Claims Resolution, 20 Berkeley J. Int'l L. 1, 3 (2002).

Much of the text of the Joint Statement also supports the German Foundation Industrial Initiative's view. The document

describes diplomatic commitments between and among the nation-signatories. E.g., § 4(b) (providing the United States and Germany "will" sign an Executive Agreement); § 4(c) (stating that the governments of Israel and certain European states "will implement" measures to ensure legal peace). And much of the text declares principles rather than binding agreements. Section 1 of the Joint Statement announces "all participants consider the overall result and the distribution of the Foundation funds to be fair to the victims and their heirs." Section 2 states "the primary humanitarian objective of the Foundation . . . is to show results as soon as possible." These broad principles arguably do not appear to define or guarantee legal obligations among private parties.

The German Foundation Industrial Initiative also points to what it considers a specific directive that the Joint Statement cannot serve as a basis for contractual claims against Germany or German companies. Specifically, the Preamble "recogniz[es] that the establishment of the Foundation does not create a basis for claims against the Federal Republic of Germany or its nationals. . . ." Preamble, para. 15. Claimants respond the purpose of this language is to clarify that payment to the Foundation of the agreed sum did not constitute an admission of liability—a standard settlement provision. "Claims" could also be read to refer to Nazi-era reparations claims, not to claims for additional "interest."

We believe the parties' characterizations of the Joint Statement bear primarily on the merits of the "interest" dispute and not the question of justiciability. We need not decide whether the high-level diplomatic efforts of various governments in negotiating the Joint Statement or the document's precatory and diplomatic language means Section 4(d) does not impose binding and enforceable obligations on the parties. We need only determine whether it is possible and appropriate for a United States court to address and answer these questions. . . .

* * * *

We now turn to an analysis of the "interest" dispute under the six *Baker* factors. For reasons that follow, we do not think this case presents a political question under any of the *Baker* factors.

The first factor asks whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate

political department." *Baker*, 369 U.S. at 217. The German Foundation Industrial Initiative has identified no specific constitutional text that commits the issues raised by this case to the Executive. . . .

. . . The mere existence of the Executive's power to extinguish claims made to the Judiciary for redress from foreign entities and to resolve certain issues raised in those claims, without an exercise of that power, does not render those claims nonjusticiable by virtue of being committed to a co-equal branch.

The second *Baker* factor asks whether there is "a lack of judicially discoverable and manageable standards for resolving" the case. *Id.* at 217. We believe the legal and factual questions presented by the "interest" dispute are of the type the judiciary is constitutionally competent to resolve under the Constitution, and equipped to resolve as a practical matter. . . .

. . . Courts routinely determine if a written text is an enforceable contract, relying on the text itself and on such parol evidence as the law allows, and routinely address questions of agency, third-party beneficiaries, and damages. The complexity of the contract issue—overlapping as it does with the law of international agreements—does not leave a court without standards. . . .

* * * *

The third *Baker* factor asks whether adjudicating the case would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker,* 369 U.S. at 217. Under this factor, a political question is implicated if in deciding the case, a court would have to make a policy determination of the kind appropriately reserved for diplomatic—and thus Executive—discretion. . . .

Resolution of the "interest" dispute would undoubtedly impact foreign relations and foreign policy. Furthermore, deciding the dispute whether additional "interest" is due might require a court to determine what the political sovereigns intended when they drafted the Joint Statement. . . .

. . . [But] [t]he question is whether a court can decide the "interest" dispute without displacing the Executive in its foreign policy making role. We conclude that it can. In adjudicating the case, a court would be interpreting an agreement already created and signed by another branch of government to determine whether

it contains an enforceable obligation for additional "interest." Interpreting agreements and deciding the nature and scope of the parties' obligations based on text and evidence are among the activities that courts often perform without considering public policy—foreign or domestic. A court need not make "an initial policy determination of a kind clearly for nonjudicial discretion" before resolving the issues presented in this case.

* * * *

Under the fourth *Baker* factor, we ask whether it would be possible for a court to "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government." *Baker,* 369 U.S. at 217. Had the United States Executive filed a statutory statement of interest under 28 U.S.C. § 517, a Statement of Interest under Annex B of the Executive Agreement, or any other document with this Court asserting its interests in dismissal, we might conclude judicial intervention would contradict and show a lack of respect for a statement or pronouncement of the United States Executive. *See, e.g.*, *Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005). . . .

The fifth *Baker* factor asks whether there is "an unusual need for unquestioning adherence to a political decision already made." . . . As *Baker* makes clear, the fifth factor contemplates cases of an "emergency[] nature" that require "finality in the political determination," such as the cessation of armed conflict. . . . Determining the end of hostilities between nations is markedly different from the issue before us. . . .

The sixth and final *Baker* factor asks about the potential of "embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217. This factor, like the fourth and fifth, is "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). Underlying this factor is the idea that a foreign government should be able to trust that diplomatic pronouncements from the United States Executive are authoritative. But here, there was no pronouncement from the United States Executive. . . .

Had the United States Executive desired, it could have filed a statutory statement of interest under 28 U.S.C. § 517, substantially similar to that in Annex B of the Executive Agreement, urging dismissal. But the United States government filed no document with a court pointing to its interests or to any foreign-policy positions that would be contradicted were we to hold this case justiciable. . . .

* * * *

. . . Accordingly, we conclude the sixth *Baker* factor, like the first five, does not render this case nonjusticiable under the political question doctrine.

c. Mandowsky v. Dresdner Bank, AG

On July 5, 2006, the U.S. District Court for the District of New Jersey denied Plaintiffs' motion to set aside the prior voluntary dismissal of their case which they had requested in order to seek compensation from the Foundation established by the Agreement between the United States and Germany concerning the Foundation "Remembrance, Responsibility, and the Future." *In re: Nazi Era Cases Against German Defendants Litigation; This Matter Relates To: Ronald Mandowsky et al., v. Dresdner Bank AG*, 236 F.R.D. 231 (D.N.J. 2006). The establishment of the Foundation is discussed in b. above; *see also Digest 2000* at 446-50. Plaintiffs brought restitution claims as heirs to family property seized in 1934 by Dresdner Bank as an agent of Nazi Germany. The property dispute had been the subject of a 1956 settlement agreement with Dresdner Bank and had also been brought before the Berlin District Court, which dismissed the claims in 1993 pursuant to the prior settlement.

The district court held that "Plaintiffs' motion must be denied for three reasons: (1) [Fed.R.Civ. P. Rule 60(b), empowering courts to relieve a party from final judgment for specified reasons] is not designed to release a litigant of a freely chosen litigation strategy, (2) Rule 60(b) is not available when granting relief would ultimately prove futile, and (3) for broader public interests." *Ronald Mandowsky*, 236 F.R.D. at 237.

In finding that plaintiffs' pursuit of their claims in U.S. court would likely prove futile because the case presented a nonjusticiable political question and raised international comity concerns, the court concluded :

> Plaintiffs essentially argue that they should not be bound by their settlement with Dresdner Bank or by the consistent conclusions of the other tribunals that have heard and denied their claims. But allowing Plaintiffs to come back to this Court and challenge the [May 25, 2004 International Organization for Migration Decision ("IOM Decision")][*] after voluntarily dismissing their lawsuit would undermine the "legal peace" that resulted in the Foundation's creation and it would open the proverbial floodgates to relitigation of similar claims. The fact that Plaintiffs voluntarily dismissed their suit to avail themselves of an alternative forum, of which they actively took part in [sic], solidifies this Court's conclusion that Plaintiffs got what they bargained for—an opportunity to present their claims with the Foundation.

Id. at 242.

On appeal before the U.S. Court of Appeals for the Third Circuit, the United States filed a Brief as *Amicus Curiae* in Support of Defendant. The United States reaffirmed its foreign policy interests with respect to the Foundation, and indicated that those interests were properly taken into account by the district court in determining that plaintiffs had not established a basis to reopen their claims. Excerpts from the U.S. amicus brief, submitted on December 28, 2006, follow (citations to appendices and most footnotes omitted). The full text is available at *www.state.gov/s/l/c8183.htm*. The case was pending at the end of the year.

* * * *

[*] Editor's note: As explained by the court, the International Organization for Migration was "one of several partner organizations to the Foundation handling "actual collection and processing of applications, and the distribution of payments."

It would eviscerate one of the primary purposes of the Foundation to permit litigants to reopen dismissed cases following implementation of the Foundation. In establishing and funding the Foundation, German companies and the German Government sought to achieve "legal peace" that was "all-embracing" and "enduring." The United States, in the Foundation Agreement, endorsed that goal as well. The parties to the negotiations relating to the Foundation surely did not envision that this "legal peace" would be temporary, or that litigants who were dissatisfied with the resolution of their claims to the Foundation could revive their claims in U.S. Courts. It would be in the foreign policy interests of the United States for the final judgment of dismissal in this litigation to remain in place, and for the Foundation to be the exclusive forum for Nazi-era and World War II claims against German companies.

The United States' foreign policy interests were properly considered by the district court in determining that the case did not present the type of "extraordinary circumstances" necessary to reopen a voluntary dismissal with prejudice. . . . Although the United States has taken no position on the underlying merits of the legal claims advanced by the parties in this case, the United States has explained that its foreign policy interests favor dismissal on any valid legal ground. Following the filing of the plaintiffs' Rule 60(b) motion seeking to reopen the final judgment in this litigation, furthermore, the United States confirmed to the district court that the Statement of Interest remained part of the record in this action. The foreign policy interests identified in the Statement of Interest are thus properly considered under Rule 60(b) as equitable factors weighing against reopening the final judgment. . . .

In addition, as the district court recognized, the United States' foreign policy interests were properly given weight to the extent they were relevant to the determination whether it would be futile to reopen the final judgment. The district court identified several legal doctrines under which the claims might have been dismissed if permitted to go forward, and under which the United States' foreign policy interests could be relevant. . . .

The Eleventh Circuit, for example, has relied on similar foreign policy interests in dismissing claims against German banks arising out of Nazi-era conduct on the grounds of international comity and

forum non conveniens. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-1237 (11th Cir. 2004). In *Ungaro-Benages*, the heir of a victim of the Nazi regime sued two German banks, alleging that they had stolen her family's interest in a manufacturing company through the Nazi program of "Aryanization." Similar to the plaintiffs in this case, the plaintiff in *Ungaro-Benages* asserted that she was unable to recover from the Foundation. The United States filed a statement of interest nearly identical to the one filed below. The Eleventh Circuit held that this statement of interest merited deference, and affirmed dismissal of the case based on "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id*. at 1238; *see also, e.g., American Insurance Ass'n v. Garamendi*, 539 U.S.396, 420-425 (2003).[6]

In addition to the foreign policy interests identified by the United States in the Statement of Interest filed in district court, the United States Government has an independent foreign policy interest in having U.S. Courts give effect to the 1993 decision of the Berlin District Court. This interest also supports the district court's discretionary refusal to reopen the final judgment based on the conclusion that the court likely would have abstained from entertaining the claims as a matter of international comity.

It is generally in the foreign policy interests of the United States for courts in this country to "defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). International comity

[6] The district court also held that the United States' foreign policy interests were relevant under the political question doctrine, suggesting that those interests might render the case non-justiciable under the test set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962). Given the district court's ruling on international comity—which . . . was also supported by the United States' general foreign policy interest in giving force and effect to the judgments of foreign courts—principles of avoidance would weigh against this Court's consideration of the political question doctrine, which has constitutional dimensions.

08-Cummins-Chap08.indd 520 10/22/07 11:41:51 PM

seeks to maintain our relations with foreign governments, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).

In this case, as we have noted, a German court determined in 1993 that any claims seeking compensation for Nazi-era wrongs to Ignatz Nacher were barred by the 1956 settlement agreement entered into on behalf of his estate. The German court also rejected the arguments that the settlement agreement was the product of deceit, and that the reunification of Germany voided the settlement agreement or provided an adequate basis for its cancellation. As the district court recognized, in order to consider the merits of the plaintiffs' request "to ignore the Berlin Court's 1993 decision" and to hold that "East German assets * * * were not included" in the 1956 settlement, a court would have "to sit in quasi-appellate review" of the German courts, which had decided those same issues "openly and fairly. . . ."

International comity "creates a strong presumption in favor of recognizing foreign judicial decrees." *Saroop v. Garcia*, 109 F.3d 165, 169 (3d Cir. 1997). Notably, the plaintiffs make no effort to challenge the validity or fairness of the German decision, but simply ignore its impact in arguing that the district court should have granted their motion to reopen final judgment. But permitting claims in a U.S. court to go forward in the face of this German court ruling could cause harm to our foreign relations, and would undermine the predictability and stability of legal expectations founded upon that ruling and the 1956 settlement agreement. The district court's appropriate exercise of international comity served to "demonstrate[] confidence in the foreign court's ability to adjudicate a dispute fairly and efficiently," and to foster the goals of "international cooperation and * * * cooperation." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). The United States' foreign policy interests in giving effect to the judgments of foreign courts were properly considered by the district court in invoking the doctrine of international comity as grounds for denying the motion to reopen.

* * * *

2. Agent Orange Litigation

On February 15, 2006, the United States submitted the Brief of the United States as *Amicus Curiae* In Support of Defendants-Appellees to the U.S. Court of Appeals for the Second Circuit in *In Re "Agent Orange" Product Liability Litigation*, following Plaintiffs' appeal of the District Court for the Eastern District of New York's dismissal of their claims concerning the use of herbicides during the Vietnam War. *See 2005 Digest* at 491-97.

Among other things, the brief argued that the political question doctrine barred the court from reviewing the Executive's military judgment that the use of herbicides for defoliation and enemy crop destruction was a necessary and lawful means of war in Vietnam. The brief urged that the court of appeals affirm the district court's dismissal of the case, but also argued that "the court was mistaken, . . . in holding that the questions raised by the plaintiffs' claims are subject to judicial review at all." Excerpts below address the argument that the district court erred in finding that the case did not raise a nonjusticiable question (footnote omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

A. The legal and policy questions raised by the plaintiffs' international law claims — in particular, whether the United States' use of Agent Orange and other herbicides in the Vietnam War was justified by military necessity — are constitutionally committed to the political branches.

As a general matter, '"[t]he conduct of the foreign relations of our Government is committed by the Constitution'" to the political branches, and '"the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

Article II vests the President with exclusive power as Commander in Chief. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging "broad powers of military

commanders engaged in day-to-day fighting in a theater of war"); *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (recognizing "Constitution's specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President"). Any residual authority over military tactics rests in Congress, which is authorized "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8; *see In re "Agent Orange,"* 818 F.2d at 198 (outlining Congress' congressional authority in relation to President's authorization of use of Agent Orange in Vietnam). "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

The plaintiffs' challenge to the military's use of Agent Orange directly implicates this sphere of exclusive political-branch authority. Indeed, this Court has already recognized that the challenged decision to use Agent Orange as a weapon of war in Vietnam was made by President Kennedy acting as "Commander in Chief of the Armed Forces with decision-making responsibility in the area of military operations." *In re "Agent Orange,"* 818 F.2d at 198 (quotation marks and citation omitted). In an analogous challenge to U.S. military action in Southeast Asia, this Court recognized that tactical decisions in a foreign war "are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary." *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d.Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The decision to use Agent Orange and other herbicides in fighting the Vietnam War is similarly nonjusticiable.

The district court mistakenly reasoned that the first *Baker v. Carr* factor* was not implicated because federal courts are empowered to resolve international-law claims. 373 F. Supp.2d at 69-70 (citing U.S. Const., art. III, § 2). Under that rationale, however, no case would fall outside judicial cognizance, since the "judicial power" under Article III also extends to all cases arising under the Constitution or federal law. Here, despite the absence of any statute establishing a substantive standard for the military's use of herbicides or creating a private cause of action for persons injured

by herbicide use, the district court claimed authority to evaluate the Executive's military judgments and to craft a remedy for alleged harms. While the review of a tort-law or international-law claim may be a judicial function, the choice of battlefield tactics is not. The decision that the military advantage gained by using herbicides to fight the Vietnam War outweighed anticipated harms is constitutionally committed to our Commander in Chief, not the courts.

B. The plaintiffs' international-law claims also implicate the second and third factors of *Baker v. Carr* because they would require judgments as to the quantum of threat posed by the Viet Cong, the value of protecting U.S. and allied soldiers from harm, the best tactics to use in the face of enemy resistance, and the appropriate balance between risk to our soldiers and the safety and well-being of enemy soldiers and other people in enemy territory. These are quintessential policy determinations that are wholly outside judicial expertise.

Federal judges are "deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action." *DaCosta*, 471 F.2d at 1155. There is no reasonable standard by which a court could second-guess the Executive's decision that particular tactical decisions were commensurate with military objectives.

Furthermore, a district court adjudicating the plaintiffs' claims would have to evaluate the use of herbicides not by reference to a single incident, but with regard to a decade-long campaign. The President authorized the use of herbicides in Vietnam "to protect United States military and civilian personnel from a grave risk of personal injury or death." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 206 (2d Cir. 1987) (quotation marks omitted) (noting that, "[t]he greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects

* Editor's note: The six factors identified by the Supreme Court in *Baker v. Carr,* 369 U.S. 186, 217 (1962), that might render a case nonjusticiable are discussed in *Gross,* 1.b. *supra.*

of a political determination"); *Schneider*, 412 F.3d at 197 (decisions regarding the need for covert military action are "not the stuff of adjudication, but of policymaking"). Our judicial system is simply not equipped to handle challenges brought by millions of Vietnamese dissatisfied with the Executive's wartime judgment as to the proper balancing of competing military goals. *See In re "Agent Orange*," 818 F.2d at 206-207.

Indeed, it is difficult to imagine how a federal court could actually try the plaintiffs' claims. A court would be required to probe the motives, reasoning, and judgment behind the President's orders approving the use of Agent Orange and selecting targets for defoliation. High-level military officials would have to testify regarding the number of soldiers dying because of heavy ground cover, the strength of enemy forces, and a host of other military exigencies. The court would have to evaluate these decisions, in order to determine whether the use of herbicides was justified by the danger posed to our forces. The political question doctrine forbids such an intrusion on the President's exercise of core constitutional powers as Commander in Chief. *See, e.g., El Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1363-1367 (Fed. Cir. 2004) (refusing to permit challenge to President's decision to bomb Sudanese manufacturing plant believed to be producing nerve gas for al Qaeda), *cert, denied*, 125 S. Ct. 2963 (2005).

The district court suggested that no concerns regarding judicially manageable standards or judicial competence were implicated because the court could refer to customary international law to evaluate the military's conduct. 373 F. Supp. 2d at 70-71. Whether couched in terms of customary international law, tort law, or some other source of law, however, "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); *see also Schneider*, 412 F.3d at 197 ("recasting foreign policy and national security questions in tort terms" does not provide judicially manageable standards for review). Faced with a similar challenge to U.S. military operations in Vietnam, which were alleged to constitute a unilateral escalation of hostilities rather than a foreseeable continuation of a

congressionally authorized war, this Court held that it was "powerless" to second-guess "the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close." *DaCosta*, 471 F.2d at 1155. Here, too, the plaintiffs' claims would require a court to undertake policy judgments that it has neither manageable standards nor expertise to make.

C. A judicial holding that the United States military's herbicide use in Vietnam violated international law would be flatly at odds with the Commander in Chief's determination that herbicide defoliation and enemy crop destruction were necessary and lawful means by which to wage the war. Subjecting the Executive's battlefield decisions to judicial scrutiny could impose extraordinary damage on our national security and the safety of our armed forces, as well as our foreign relations. And a ruling in the plaintiffs' favor would conflict with the view of the Executive Branch during the Vietnam War that the use of herbicides for defoliation and enemy crop destruction did not violate any binding obligation of international law. The plaintiffs' claims thus implicate the fourth, fifth, and sixth factors of *Baker v. Carr. See, e.g., Schneider*, 412 F.3d at 198.

* * * *

Cross References

Political question analysis in cases against the United States, **Chapters 5.B.3. and 9.B.**
Political question analysis in case involving foreign governments, **Chapters 6.I.1.a.-c. and e. and 10.A.1.b.(3)(iii) and C.3.**
Claims under NAFTA and WTO, **Chapter 11.B. and C.**

Chapter 9

Diplomatic Relations, Succession and Continuity of States

A. ESTABLISHMENT OF U.S. DIPLOMATIC POSTS

1. Libya

Continuing the normalization of relations with Libya, the United States opened a full embassy in Tripoli on May 31, 2006. Diplomatic personnel had previously reopened the U.S. Interest Section on February 4, 2004, and it became a U.S. Liaison Office on June 28, 2004. *See Digest 2004* at 451. Secretary of State Condoleezza Rice announced and reported to Congress on May 15, 2006, her intent to increase the level of diplomatic representation in Libya, stating in a press release of that date:

> I am pleased to announce that the United States is restoring full diplomatic relations with Libya. We will soon open an embassy in Tripoli. . . .
>
> We are taking these actions in recognition of Libya's continued commitment to its renunciation of terrorism and the excellent cooperation Libya has provided to the United States and other members of the international community in response to common global threats faced by the civilized world since September 11, 2001.

The full text of the Secretary's statement is available at *www.state.gov/secretary/rm/2006/66235.htm*. The upgrade of the U.S. Liaison Office to a U.S. Embassy was confirmed in

09-Cummins-Chap09.indd 527 10/22/07 11:42:19 PM

an exchange of diplomatic notes on May 31, 2006. *See also* Chapter 3.B.1.c. and d. concerning terrorism-related actions related to Libya.

2. Monaco

The United States upgraded official relations with the Principality of Monaco from the consular to the diplomatic level in December 2006. As explained in the country Background Note for Monaco, "[s]hortly after, Ambassador Craig Stapleton (France) was accredited to Monaco, and Ambassador Gilles Noghes became the first Monegasque ambassador to the United States." Day-to-day relations are handled through the U.S. Consulate General in Marseille. *See www.state.gov/r/pa/ei/bgn/3397.htm*.

3. Montenegro

Montenegro held a referendum on May 21, 2006, in which the majority voted for independence. In a June 4, 2006, letter to Secretary of State Condoleezza Rice, the Montenegrin Minister of Foreign Affairs Miodrag Vlahovic requested that the United States recognize Montenegro as a sovereign, independent state and invited the establishment of diplomatic relations between the two countries.

Secretary Rice responded on June 12, 2006 with a letter that recognized Montenegro's sovereignty and independence, stating:

> I am pleased to inform you that the United States government recognizes the Republic of Montenegro as a sovereign and independent state, consistent with the request of your government and the will of the people of Montenegro. . . .
>
> * * * *
>
> The United States will be considering in the coming days Montenegro's proposal to begin a process of establishing diplomatic relations. . . .

The full text of Secretary Rice's letter is available at *www.state.gov/secretary/rm/2006/67839.htm*.

On August 15, 2006, U.S. Department of State Spokesman Sean McCormack announced that "[t]he United States has established diplomatic relations with the Republic of Montenegro following an exchange of letters between President Bush and Montenegrin President Filip Vujanovic." The full text of the announcement is available at *www.state.gov/r/pa/prs/ps/2006/70693.htm*.

The letter from President Bush to President Vujanovic stated in part:

> I am pleased to propose that our two countries establish diplomatic relations on the basis of the assurances and understandings outlined in the June 4 letter from Foreign Minister Vlahovic to Secretary Rice. If your government agrees, the United States would welcome the establishment by Montenegro of diplomatic representation in the United States and will plan to do likewise in Montenegro.

The full text of the letter is available at *www.state.gov/s/l/c8183.htm*. In October 2006 the United States opened its embassy in the capital city of Podgorica. *See http://podgorica.usembassy.gov/embassy/press/2006/061004.html*.

4. San Marino

The United States began the process of upgrading official relations with the Republic of San Marino from the consular to the diplomatic level in 2006. As explained in the country Background Notes, available at *www.state.gov/r/pa/ei/bgn/5387.htm#relations*:

> In September 2006 President George W. Bush appointed Ambassador to Italy Ronald P. Spogli to serve concurrently as Ambassador to San Marino. Ambassador Spogli is the first

U.S. Ambassador to San Marino in the country's history. For consular purposes, the republic is within the jurisdiction of the Florence consular district. Consulate officials regularly visit San Marino to carry out diplomatic demarches, represent U.S. interests, and administer consular services. The United States Consul General in Florence has served as the U.S. diplomatic representative to San Marino.

At the end of 2006 the accreditation process was not yet complete.

B. EXECUTIVE BRANCH CONSTITUTIONAL AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORTS

Litigation continued in 2006 in a lawsuit brought by a U.S. citizen child Menachem Binyamin Zivotofsky (by his parents and guardians) challenging the Department of State's refusal to grant his request to list "Jerusalem, Israel" or "Israel" (rather than "Jerusalem") as the place of birth in the child's U.S. passport and Consular Report of Birth Abroad ("CRBA"). *Zivotofsky v. Secretary of State*, No. 1:03-cv-01921-GK. On August 31, 2004, the U.S. District Court for the District of Columbia dismissed this and a companion lawsuit for lack of standing and because the cases presented non-justiciable political questions. *See Digest 2004* at 452-54 for a discussion of the unpublished district court opinion, available at *www.state.gov/documents/organization/78199.pdf*, and *Digest 2003* at 485-501. The plaintiff appealed the dismissal to the U.S. Court of Appeals for the District of Columbia.

1. D.C. Circuit Court of Appeals Opinion

On February 17, 2006, the court of appeals reversed the district court, holding that Menachem Zivotofsky had standing to pursue his claim. *Zivotofsky v. Sec. of State*, 444 F.3d 614 (D.C. Cir. 2006). The court of appeals remanded the case to the district court to consider whether the plaintiff's revised demand to list the place of birth as "Israel," as provided for in

relevant legislation, presented a non-justiciable political question in the same way as the plaintiff's original demand to list the birthplace as "Jerusalem, Israel." Excerpts follow, including an explanation of § 214(d) of Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1365-66 (2002) ("Authorization Act"), the statute at issue in the case.

---

* * * *

Menachem Binyamin Zivotofsky was born in Jerusalem on October 17, 2002. As a child of U.S. citizens who have resided in the United States, he also is a U.S. citizen. 8 U.S.C. § 1401(c). The ultimate issue in this appeal is whether § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228, 116 Stat. 1350, 1365-66 (2002) ("Authorization Act"), entitles Menachem to have "Israel" listed on his U.S. passport as his place of birth. The district court did not reach the issue. It dismissed the complaint for lack of standing and because it believed the case presented a political question it could not resolve.

* * * *

. . . Section 214 is titled "United States policy with respect to Jerusalem as the capital of Israel." . . . Subsection (d), which is the focus of this appeal, provides:

> For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Authorization Act § 214(d).

When the President signed the Authorization Act into law, he made the following statement regarding § 214:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary

> executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002). The status of Jerusalem is, as a matter of U.S. policy, "a matter to be resolved by negotiation between the Israelis and Palestinians" in light of their competing claims of sovereignty over the city. Br. for Appellee 7.

Section 214 of the Authorization Act conflicts with instructions in the State Department's Foreign Affairs Manual. . .

. . . With regard to Jerusalem, the Manual differentiates between applicants born before and after the existence of an official Israeli state. *See id.* § 1383.5-6 (Jerusalem). For those like Menachem—a citizen born in Jerusalem after May 14, 1948—the Manual requires the person's place of birth to be recorded as "JERUSALEM." *See id.* § 1383.1(b) (requiring compliance with the "birthplace transcription guide" when "entering the place of birth in the passport"); *id.* § 1383 Ex. 1383.1, Pt. II (Birthplace Transcription Guide for Use in Preparing Passports) (JERUSALEM) (citing *id.* §§ 1383.5-5, .5-6); *see also id.* (ISRAEL) (indicating that Israel "does not include Jerusalem") (citing *id.* § 1383.5-5).

* * * *

. . . [Menachem's] allegation that Congress conferred on him an individual right to have "Israel" listed as his place of birth on his passport and on his Consular Birth Report is at the least a colorable reading of the statute. He also alleges that the Secretary of State violated that individual right. This is sufficient for Article III standing. . . .

The district court concluded that a U.S. passport inscribed "Jerusalem, Israel" might signify to others that the United States recognized Israel's sovereignty over Jerusalem. . . . The case, however, no longer involves the claim that the district court

considered. . . . Both sides agree that the question now is whether § 214(d) entitles Menachem to have just "Israel" listed as his place of birth on his passport and on his Consular Birth Report.

Whether this, too, presents a political question depends on the meaning of § 214(d)—is it mandatory or, as the government argues, merely advisory? And it may depend also on what the effect would be of listing "Israel" on the passports of citizens born in Jerusalem. . . .

* * * *

2. U.S. Submissions

The United States filed (a) Defendant's Responses to Plaintiff's Interrogatories to Defendant Relating to 'Political Question' Issue" on June 5, 2006; (b) Memorandum of Law in Support of Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law on October 3, 2006; and (c) Defendant's Reply in Support of its Motion to Dismiss or in the Alternative for Judgment as a Matter of Law on December 7, 2006. Zivotofsky moved for summary judgment, and on November 6, 2006, the United States filed (d) Defendant's Opposition to Plaintiff's Motion for Summary Judgment. The parties' motions to dismiss and for summary judgment remained pending before the district court at the end of the year. The full texts of the U.S. submissions excerpted below (footnotes omitted) are available at *www.state.gov/s/l/c8183.htm*.

Defendant's response to interrogatory 5 (June 2006)

Interrogatory No. 5 requested a description of "specifically any harm to the foreign policy of the United States that would result if American citizens born in Jerusalem carried U.S. passports that showed their place of birth as 'Israel.'" Excerpts follow from the response; the full text is attached as Exhibit 1 to the declaration of JoAnn Dolan, Attorney-Adviser,

U.S. Department of State, accompanying the memorandum of law excerpted below and available at *www.state.gov/s/l/c8183.htm*.

. . . . U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel, whether in the context of listing Israel as the place of birth for individuals born in Jerusalem, when issuing U.S. passports or Consular Reports of Birth Abroad, which are official statements of the U.S. Government, or in any other official public context. Misstatements and clerical errors in isolated official documents pertaining to Jerusalem can be explained as not reflecting any change in official policy or practice with respect to the status of Jerusalem. On the other hand, an official decision by the United States to begin to treat Jerusalem as a city located within Israel at the present time would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests.

The status of Jerusalem has remained in dispute since 1948 as the result of wars, key United Nations Resolutions, and other interim arrangements and understandings between the parties to the Arab-Israeli conflict. These parties recognized the special status of Jerusalem when they agreed in 1993 that the status of Jerusalem and certain other issues would be addressed in permanent status negotiations. The United States policy since the Truman Administration has consistently been to promote a final and permanent resolution of final status issues, including the status of Jerusalem, through negotiations by the parties and supported by the international community.

This President and his Administration have remained committed to a just and durable peace between Israel and the Palestinians and to the President's vision, as laid out on June 24, 2002, for a settlement negotiated between the parties based on U.N. Security Council Resolutions 242 and 338, with Israeli withdrawal to secure and recognized borders. In the context of such a settlement,

the President stated that questions concerning Jerusalem and other issues must also be resolved. *http://www.state.gov/p/nea/rt/13544.htm*. The U.S. Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, "the Quartet"), developed A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" that was presented to Israel and the Palestinians on April 30, 2003. *http://www.state.gov/p/nea/rls/rm/20115.htm*. Phase III of the Roadmap for Peace provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. *http://www.state.gov/documents/organization/36464.pdf*. The President met with the leaders of Jordan, Israel and the Palestinian Authority on June 4, 2003 at Aqaba, Jordan and confirmed in a joint press conference that "All here today now share a goal: the Holy Land must be shared between the state of Palestine and the state of Israel, living at peace with each other and with every nation in the Middle East. All sides will benefit from this achievement and all sides have responsibilities to meet. As the road map accepted by the parties makes clear, both must make tangible, immediate steps toward this two-state vision."

Although the timetable envisioned in 2003 has not been met, the President has confirmed this longstanding U.S. policy, most recently on May 23, 2006 during the visit of Israel's Prime Minister Ehud Olmert to Washington, when he stated:

> In 2002, I outlined my vision of two democratic states, Israel and Palestine, living side-by-side in peace and security. Prime Minister Olmert told me that he and his government share this vision. The international community seeks to realize this goal to the road map, which calls for a comprehensive settlement that resolves all outstanding issues between Israelis and Palestinians. I believe, and Prime Minister Olmert agrees, that a negotiated final status agreement best serves both the Israelis and the Palestinians, and the cause of peace. *http://www.whitehouse.gov/news/releases/2006/05/print/20060523-9.html*.

To the extent U.S. Government maps and official publications refer to Jerusalem as the capital of Israel, they are to make clear by footnote, such as in the Department of State's "Background Notes for Israel, that "Israel proclaimed Jerusalem as its capital in 1950. The United States, like nearly all other countries, maintains its embassy in Tel Aviv." In addition, the U.S. Consulate in Jerusalem reports directly to the Department of State rather than through the U.S. Embassy in Tel Aviv. The Department's policy on designation of Jerusalem as place of birth in passports and on birth and death certificates is another manifestation of this policy.

Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap. The Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own. It would be seen as a breach of the cardinal principle of U.S. foreign policy barring any unilateral act(s) that could prejudge the outcome of future negotiations between the contending parties and cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict. As President Bush stated on May 23, 2006, "any final status agreement will be only achieved on the basis of mutually agreed change, and no party should prejudice the outcome of negotiations on a final status agreement. . . ."

Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel. It was within this highly charged context that enactment in 2002 of Section 214 of the Foreign Relations Authorization Act,

FY 2003, purporting to require reversal of this longstanding policy, provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that "U.S. policy regarding Jerusalem has not changed." Upon its enactment, Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions under Section 214. The PLO Executive Committee, the Fatah Central Committee and the Palestinian Authority cabinet issued statements harshly critical and asserting that it "undermines the role of the U.S. as a sponsor of the peace process." The Speaker of the Palestinian Legislative Council issued a statement that the law was "an unprecedented undervaluing of Palestinian, Arab and Islamic rights in Jerusalem" that "raises questions about the real position of the U.S. Administration vis-à-vis Jerusalem." Numerous political personalities issued statements condemning the law. For example, Nabil Shaath, the Palestinian Authority's planning and international cooperation minister at the time, was quoted in the press as saying the move was "an act against peace, an act of incitement." The Financial Times Limited, Financial Times (London, England), October 2, 2002 Wednesday, London Edition 1, "US ruling on Jerusalem takes Arabs by surprise—Foreign Policy New Law Recognises City as Israeli Capital;" Byline: James Drummond and Richard Wolffe; Dateline: Cairo and Washington.

As further observed in contemporaneous press accounts, "The international community does not recognize Jerusalem as the capital of the Jewish state. Arab nations have warned that any American move to recognize it as Israel's capital would severely harm relations between the Arab world and the United States." 2002 SOFTLINE INFORMATION, INC., Ethnic NewsWatch, October 4, 2002; Section: Vol. CVI; No. 31; Pg. 6; Headline: Bush, Lawmakers Clash Over Status of U.S. Consulate in Jerusalem; Byline: Nir, Ori. In line with this, it was further reported that "An official with a Jewish organization in Washington who is familiar with the drafting of the bill said that the provisions were intended not only to reaffirm the American commitment to recognizing Jerusalem as Israel's capital," but also to "downgrade the relationship between the Palestinians and the U.S." Id.

From a foreign policy perspective, regardless of whether "Israel" or "Jerusalem, Israel," were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known, as was the enactment of Section 214 in 2002. The implications would be equally adverse and dramatic. We would expect those groups that have advocated strenuously for legislation to compel the foreign policy change would tout the reversal as a political victory in public discourse. Similarly, those groups likely to be critical of any U.S. policy change that could be perceived as prejudicing final status issues could be expected to condemn such a decision. As a practical matter, publication that the United States had begun to designate "Israel" to record births outside internationally recognized territory of Israel could provoke greater scrutiny and travel delays in some countries for any American travelers bearing a passport noting "Israel" as the place of birth, regardless of whether they were born in Jerusalem or areas of Israel not subject to international dispute.

Furthermore, the reversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad.

Memorandum of Law in Support of Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law (October 3, 2006)

---

* * * *

Invoking Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Plaintiff, who was issued a passport and CRBA properly designating his place of birth as "Jerusalem," urges this Court to overturn longstanding U.S. foreign policy by forcing the Secretary to declare publicly in officially issued government documents that an individual born in "Jerusalem" was born in "Israel." In effect, Plaintiff asks this Court to resolve whether to

recognize the sovereignty of Israel over Jerusalem and the communication of such recognition publicly. The political question doctrine, however, excludes from judicial review decisions that, as here, involve matters that are constitutionally committed to the political branches of government. As this Court previously has concluded, the recognition of sovereigns is constitutionally committed to the Executive. Since Plaintiff's request implicates that authority of the President, Plaintiff's claim is wholly unsuited for judicial resolution. Accordingly, this Court should dismiss this action under the political question doctrine.

If, notwithstanding that compelled disposition of this action, this Court reaches the merits of Plaintiff's claim, the Court should uphold the Department of State's decision to deny Plaintiff's request, consistent with longstanding U.S. government policy of identifying only "Jerusalem" as the place of birth on the passports and CRBAs of U.S. citizens born within that city. Although Section 214(d) of the Foreign Relations Authorization Act purports to give such citizens the option of requesting that "Israel" be designated as their place of birth, the doctrine of constitutional avoidance compels this Court to construe that statute as permissive not mandatory. Otherwise, Section 214(d) is a clear infringement on the President's plenary authority to conduct foreign affairs. By construing that section as indicating Congress's preference as to the place of birth designations of U.S. citizens born in Jerusalem, this Court need not reach the constitutionality of Section 214(d). Such construction is also consistent with the rule against implied repeals of statutes—here, 22 U.S.C. § 211a and 22 U.S.C. § 2656, which together give the Secretary wide discretion over U.S. passport policy. But if the Court were to decide the constitutionality of Section 214(d), that provision should be struck down as an unconstitutional infringement on the President's authority. . . .

* * * *

Plaintiff's reformulated request for identification of "Israel" as his birthplace on his passport and CRBA raises the same political question that his prior request for "Jerusalem, Israel" did. Therefore, the Court should again dismiss this action under the political question doctrine. *See* Mem. Op. at 10. That doctrine "excludes from

judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). . . .

This Court should dismiss Plaintiff's claim because it is inextricably intertwined with U.S. foreign policy on Israel and the Arab-Israeli conflict. The conduct of foreign relations "is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government." *Schneider*, 412 F.3d at 194. . . .

* * * *

Nowhere is judicial inquiry more inappropriate than in the area in which Plaintiff would have this Court intrude—the recognition of foreign sovereigns. *See Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C. Cir.). . . . That "authority is not limited to a determination of the government to be recognized. . . . [but i]t includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229 (1942). . . .

Plaintiff's request for "Israel" to be designated as his place of birth on his passport and CRBA is tantamount to requesting that this Court override long-standing U.S. government policy on the status of Jerusalem and would have the same effect on international relations as designating "Jerusalem, Israel" his place of birth. . . .

Although this Court need not determine that other characteristics of a political question are present to dismiss this action under that doctrine, Plaintiff's claim also implicates the other factors of a political question. . . .

* * * *

. . . This Court plainly cannot decide Plaintiff's claim without making initial policy determinations as to the United States' position vis-a-vis Jerusalem and the impact of a perceived or real change in that policy. Since such policy determinations unquestionably do not lie within judicial discretion and have no judicially manageable standards to resolve them, these additional characteristics of Plaintiff's claim compel dismissal under the political question doctrine. . . .

Resolving this action in Plaintiff's favor would manifest a lack of respect for the President's policy concerning the status of Jerusalem. "A court should refrain from entertaining a suit if it would be unable to do so without expressing a lack of respect due to its co-equal Branches of Government." *Schneider*, 412 F.3d at 198. . . .

The United States' policy for the past half century has been and continues to be that the parties to the Middle East conflict are to finally resolve the status of Jerusalem through permanent status negotiations. . . . Until such time, the United States does not recognize any country as having sovereignty over Jerusalem. The identification of Plaintiff's birthplace as "Israel" on his U.S. passport and CRBA is contrary to that foreign policy decision of the President. Although the language of Section 214 arguably calls into question Congress's adherence to that policy, this Court plainly cannot decide Plaintiff's claim without contradicting either or both political branches of government on this issue. Since the political question doctrine contemplates precluding judicial review under those circumstances, this additional characteristic of Plaintiff's claim compels dismissal under that doctrine. *Cf. Schneider*, 310 F. Supp. 2d at 264. . . .

* * * *

Controversies that involve "a potential for embarrassment if the judicial and the political branches made conflicting pronouncements on questions relating to foreign affairs" raise a nonjusticiable political question. *Bancoult*, 370 F. Supp. 2d at 17. . . . That potential is clearly apparent from the record before this Court. A court order requiring the Department of State to issue a passport and CRBA identifying "Israel" as Plaintiff's place of birth may be construed as a judicial determination of Israeli sovereignty over Jerusalem, which would be an embarrassing inconsistency with the Administration's position. Thus, the presence of yet another characteristic of a political question counsels against this Court deciding Plaintiff's claim.

* * * *

By construing Section 214(d) as permissive instead of mandatory, this Court avoids reaching the constitutionally of that enactment.

It is a "fundamental rule of judicial restraint" that courts should "not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 467 U.S. 138, 157 (1984). . . .

* * * *

The Executive's permissive reading of Section 214(d) is entitled to deference. Courts traditionally have afforded deference to the President in matters of foreign policy. *See, Regan v. Wald*, 468 U.S. 222, 243 (1984). . . . Affording that deference here, this Court should uphold the executive's permissive construction of Section 214(d), as a mandatory reading of that provision would threaten the President's goal of realizing two democratic states—Israel and Palestine—living side by side in peace and security, which he regards as "one of the greatest objectives" of his presidency.

* * * *

Reply in Support of Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law (December 7, 2006)

* * * *

The reaction in the Middle East and elsewhere in 2002 to the enactment of Section 214(d)—the statute on which the plaintiff seeks to rely here—is representative of the effects that would follow any actual reversal of U.S. policy regarding the status of Jerusalem. As described in the Secretary's interrogatory responses:

> Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions [in Section 214]. . . . The PLO Executive Committee, the Fatah Central Committee, and the Palestinian Authority cabinet issued statements harshly critical and asserting that [Section 214] "*undermines the role of the U.S. as a sponsor of the peace process*." The Speaker of the Palestinian Legislative Council issued a statement that the law was "an unprecedented undervaluing of Palestinian, Arab and Islamic rights in Jerusalem" that

> "raises questions about the real position of the U.S. Administration vis-a-vis Jerusalem."

Id. at 10 (emphasis added); *see* Dolan Decl., Exs. 3, 4 (summarizing Arab reaction in 2002). . . .

* * * *

Plaintiff's only responses regarding the justiciability of this case, in his opposition memorandum, are to assert (1) that putting "Israel" as the birthplace on his passport would not equate to recognition of a foreign sovereign, . . . , and (2) that this case involves a judicially cognizable question of statutory construction and enforcement rather than a nonjusticiable question of foreign sovereignty. . . . Saying that Americans born in Jerusalem were born in "Israel" is effectively the same as saying that Jerusalem is within the sovereign territory of Israel. The authority to recognize foreign sovereigns—which is indisputably the sole province of the Executive—obviously includes the authority to recognize the extent of a sovereign's territorial sovereignty. . . . Therefore, whether to say, in United States passports, that citizens born in Jerusalem were born in "Israel" is constitutionally committed to the Executive and is not cognizable in court. . . .

Plaintiff's second response on the "political question" issue—that this case presents a mere question of statutory construction and enforcement rather than an issue of foreign sovereignty—reflects an incomplete understanding of the political question doctrine. Although some questions are nonjusticiable because they are inappropriate for judicial resolution and are thus reserved for the political branches—that is, the Executive and/or the Legislative—certain questions are nonjusticiable because of a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Importantly, the Supreme Court in *Baker v. Carr* did not say "textually demonstrable commitment to the coordinate political departments" (in the plural), but rather "textually demonstrable . . . commitment . . . to ***a*** coordinate political department" (in the singular). 369 U.S. at 217 (emphasis added).

Indeed, the Supreme Court's first reference to the political question doctrine, which appeared in *Marbury v. Madison*, related

specifically to the commitment of a question *to the Executive*. As quoted by the D.C. Circuit in *Schneider v. Kissinger*:

> In the venerable case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), Chief Justice Marshall first expressed the recognition by the judiciary of the existence of a class of cases constituting "political act[s], *belonging to the executive department alone*, for the performance of which entire confidence is placed by our Constitution *in the supreme executive*; and for any misconduct respecting which, the injured individual has no remedy." *Id.* at 164.

412 F.3d at 193 (emphasis added). Thus, if an issue is constitutionally committed to the Executive, it is inappropriate for resolution by any other Branch, and is not cognizable in court. Since the statute on which plaintiff attempts to rely deals with an issue committed to the Executive—the recognition of foreign sovereignty—this case cannot present a mere question of statutory construction and enforcement.

In an earlier case involving foreign affairs and the power of the Executive, this Court declined, based on the political question doctrine, to consider whether United States Forces were involved in "hostilities" for purposes of the War Powers Resolution. *See Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987). The Court observed that "a declaration of 'hostilities' by this Court could impact on statements by the Executive that the United States is neutral in the Iran-Iraq war and, moreover, might create doubts in the international community regarding the resolve of the United States to adhere to this position." *Id.* at 340. Similarly, an order requiring the Executive to enter "Israel" as the birthplace of passport holders pursuant to Section 214(d) would interfere with the carefully articulated U.S. policy with respect to the issue of Jerusalem, and would "create doubts"—even more than Section 214(d) has already created—"in the international community regarding the resolve of the United States to adhere to this position." Even more than the situation during the Iran-Iraq war, "the volatile situation in the [Middle East] demands . . . a 'single-voiced statement of the Government's views.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. at 211).

As in *Lowry*, therefore, this Court should "refrain[ ] from joining the debate" on sovereignty over Jerusalem. *Id*.

* * * *

Defendant's Opposition to Plaintiff's Motion for Summary Judgment (November 6, 2006)

---

* * * *

Plaintiff urges this Court to second-guess the Executive's judgment on the effect of a change in the government's Jerusalem policy because the Department of State allegedly complied with a statute "virtually identical in form" that concerned Taiwan. *See* Pl. Mem. at 10-12 (discussing The State Department Authorization Technical Corrections Act of 1994, Pub. L. Nos. 103-236 and 103-415 (1994)). That statute provides that "For purposes of the registration of birth or certification of nationality or issuance of a passport of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." Pub. L. No. 103-236, Sec. 132, 108 Stat. 395 (1994); Pub. L. No. 103-415, 108 Stat. 4302 (1994) (technical amendment inserting the phrase "or issuance of a passport"). The Department of State previously had permitted only designation of "China" as the place of birth on passports of U.S. citizen born in Taiwan . . . consistent with the government's policy acknowledging the Chinese position that "there is but one China and Taiwan is part of China and not a separate state." *See* U.S.-PRC Joint Communique of January 1, 1979 at http://usinfo.state.gov.eap/Archive_Index/joint_communique_1979.html. . . .

Plaintiff's contention is unfounded. First, the situation in the Middle East is unique and dictates that the government's policy be tailored to the circumstances there. . . . Plaintiff's suggestion that nevertheless there is a one-size fits all foreign policy ignores what courts have long recognized, that foreign policy decisions are "delicate, complex, and involve large elements of prophecy" and thus "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Chicago & S. Air Lines*, 333 U.S. at 111.

Second, as discussed earlier, the statute at issue here would force the Executive Branch to communicate in official government

documents that Israel has sovereignty over Jerusalem, in direct conflict with the government's longstanding policy on the status of that city. *See* Dolan Decl. ex. 1 at 7. . . . The Taiwan legislation, in contrast, does not force the Executive Branch to take a position contrary to its policies regarding Taiwan and China (i.e. the one China policy) and can be implemented consistent with those policies that were explicitly acknowledged by Congress in the Taiwan Relations Act ("TRA"), 22 U.S.C. §3301 et seq. Rather, consistent with the TRA and Executive Branch policy regarding Taiwan, the Taiwan passport legislation permits a U.S. citizen born in "Taiwan" to have the geographic designation "Taiwan" registered as the birthplace instead of the designation "China." That practice, moreover, is consistent with the broad policy set forth in 7 *Foreign Affairs Manual* ("FAM") 1383.6:

> U.S. citizens born abroad are permitted the option of entering the name of the city or town, rather than the country, of their birth when there are objections to the country listing shown on the birthplace guide.

Dolan Decl. Ex. 2 [DOS 1218]. It is also consistent with designations authorized for other non-sovereign state geographic locations such as the West Bank, Gaza, and Western Sahara. Plaintiff's request for "Israel" is clearly not analogous to these examples. Thus, the fact that the Department of State has a different policy for Taiwan than for Israel is not pertinent to the issue before this Court.

* * * *

Similarly flawed is Plaintiff's contention that because the primary purpose of the birthplace entry is identification of the passport holder, "[i]t was never intended to have any foreign-policy significance," and therefore "Congress has the authority to specify . . . how a baby born in Jerusalem should have his or her place of birth identified on a CRBA." . . . The record before the Court clearly establishes that the particular birthplace specification has foreign-policy implications, (*see* Dolan Decl. Ex. 1 at 9-10), and Plaintiff concedes as much. *See* Pl. Mem. at 2 (discussing East Germany's

objection to the United States' refusal to identify that country as "German Democratic Republic" on passports). As already discussed, . . . the foreign-policy implications of Plaintiff's request for "Israel" to be designated his birthplace could not be plainer. None of Plaintiff's historical evidence on the *purpose* behind including such information on passports is to the contrary.

* * * *

Chapter 10

Immunities and Related Issues

A. SOVEREIGN IMMUNITY

1. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to applicable international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exceptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities. The FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). For a number of years before enactment of the FSIA, courts abided by "suggestions of immunity" from the State Department. When no suggestion was filed, however, the courts made the determination.

In the FSIA Congress codified the "restrictive" theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those that are private or commercial in character. The United States had previously adopted the restrictive theory in the so-called "Tate Letter" of 1952, reproduced at 26 Dep't State Bull. 678 at 984-85 (1952). *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–715 (1976).

10-Cummins-Chap10.indd 549 10/22/07 11:43:02 PM

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver or agreement to arbitrate. Over time, amendments to the FSIA incorporated additional exceptions, including one for acts of terrorism in certain circumstances enacted in 1996. The various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)-(7), have been subject to significant judicial interpretation. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. Government is not a party and participates, if at all, as *amicus curiae*.

The following items represent a selection of the relevant decisional material during 2006.

a. Scope of Application

(1) Definition of foreign state

(i) Organ of foreign state: Powerex Corp. v. Reliant Energy Services

In November 2006 the United States filed a brief as *amicus curiae* in response to an invitation from the Supreme Court on two petitions for writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit concerning the status of a Canadian energy company. *Powerex Corp. v. Reliant Energy Services,* Case No. 05-85 and *Powerex Corp. v. State of California*, Case No. 05-584. The claims in these cases arose from alleged manipulation of the electricity market in violation of California state law and were originally filed in California state court. The U.S. submission took no position on the merits of the claims at issue but stated that it "believes the courts below erred in failing to recognize [Powerex's] status as an organ of British Columbia that is entitled to the procedural protections of the FSIA." As explained in the U.S. brief:

> . . . The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:
>
> > any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a

> foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
>
> 28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

In Case No. 05-85, Powerex and BC Hydro had filed notices removing the case to federal district court pursuant to the FSIA, 28 U.S.C.§ 1441(d), as well as 1442(a)(1). The district court remanded the case to California state court. In so doing, the district court concluded that Powerex was not within the FSIA definition of "agency or instrumentality," rejecting most significantly Powerex's claim to be an "organ" of British Columbia and thus to be within the "organ prong" of the FSIA's "agency or instrumentality" definition. Based on this conclusion, the court further concluded that Powerex was not entitled to remove the case to federal court. As to BC Hydro, the district court found that it qualified as a "foreign state" for purposes of the FSIA, and that the claims against it did not fall within any of the FSIA's exceptions to immunity. The court also found that two other defendants that removed, Bonneville Power Administration ("BPA") and Western Area Power Administration ("WAPA"), were immune from suit as agencies of the U.S. Government. The district court then remanded the entire case to state court. On appeal, the Ninth Circuit upheld the district court's decisions as to immunity of the three entities, but also held that "the district court erred in refusing to dismiss the claims against the federal agencies [BPA and WAPA] because, in a removed action, a defendant's immunity 'is vindicated only by the district court's dismissal of the claims.'" As to Powerex, however, it agreed that Powerex was not an agency or instrumentality of a foreign state under the FSIA, and therefore not entitled to remove the case to

federal court. (Powerex had not claimed immunity, but only foreign sovereign status entitling it to a federal forum). *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004).

The U.S. brief argued that the Supreme Court should grant review of the first question presented in No. 05-85 and hold the petition in No. 0-5-584 pending resolution of No. 05-85.* The United States answered in the affirmative that first question:

> Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 et seq., as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

Excerpts below from the U.S. brief describe Powerex and provide U.S. views on the proper application of the term "organ of a foreign state or political subdivision" in the FSIA, a term not previously considered by the Supreme Court (footnotes and citations to other submissions omitted). The full text is available at *www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0085.pet.ami.inv.pdf*. The petition for certiorari was granted by the Supreme Court on January 7, 2007, 127 S. Ct. 1144 (2007).

* * * *

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and

* In No. 05-584 the California Attorney General sued Powerex in California state court alleging manipulation of the energy market in violation of state law. Powerex removed the case to federal district court; the district court remanded to state court, relying on the Ninth Circuit decision in No. 05-85. On appeal, the Ninth Circuit dismissed for lack of jurisdiction.

Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province of British Columbia. As a crown corporation, BC Hydro is subject to the control and direction of provincial officials, and BC Hydro pays its net revenue to the provincial government.

Some of BC Hydro's responsibilities include implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefiting both nations. Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. In those circumstances, the treaty provides that the United States will reimburse BC Hydro (as assignee of Canada) for foregone power-generating opportunities.

BC Hydro generates more electric power than the Province needs. In 1988 BC Hydro created petitioner as a wholly owned subsidiary to market BC Hydro's excess power capacity to the United States, including the power to which Canada is entitled under the Columbia River Treaty. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada. Petitioner's income is consolidated with that of BC Hydro and transferred either to the Province itself or to a special rate-stabilization account according to a formula specified by the Province.

* * * *

DISCUSSION

The court of appeals' application of the FSIA's "organ of a foreign state" provision, 28 U.S.C. 1603(b)(2), is erroneous and conflicts with decisions of other courts of appeals. Moreover, the issue is an important, recurring, and sensitive one that warrants this Court's consideration. Although respondents assert several purported obstacles to the Court's reaching that issue, we believe that the petition in No. 05-85 presents an appropriate vehicle for this Court's review. . . .

I. THE COURT OF APPEALS MISAPPLIED AN IMPORTANT PROVISION OF THE FSIA, AND ITS ANALYSIS CONFLICTS WITH THAT OF OTHER CIRCUITS

A. The FSIA establishes a "comprehensive scheme" governing the extent to which "foreign sovereigns may be held liable in a court in the United States." *Verlinden B.V. v. CentralBank of Nigeria*, 461 U.S. 480, 496-497 (1983). In recognition of the fact that many states engage in commercial activities not unlike those of private actors, the FSIA codifies the "restrictive theory" of foreign sovereign immunity, according to which foreign states may be sued for their "commercial activities." *Id.* at 487-488. Although the FSIA denies immunity to foreign states in those circumstances, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, the Act guarantees foreign states" certain procedural protections, such as the right to remove a civil action from state to federal court. *Id.* at 489. The FSIA also guarantees a foreign state the right to a bench, rather than jury, trial in federal court on claims as to which they are not immune, see 28 U.S.C. 1330(a), 1441(d).

Congress recognized that there are any number of ways in which foreign governments may organize their operations and functions, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, Congress extended the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), and provided that entities could qualify as an "agency or instrumentality" in several ways, 28 U.S.C. 1603(b). The statutory definition establishes a categorical rule with respect to an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (construing that categorical protection to require direct ownership by the foreign state or political subdivision). In contrast to that categorical rule, the other prong of the definition—"an organ of a foreign state or political subdivision"—is intended to have a more functional application that is not dependent on a particular form of organization. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976) (recognizing that an

agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name").

This Court has never addressed the meaning or application of this prong of FSIA's definition of an agency or instrumentality, yet that provision has taken on additional importance since the Court's decision in *Dole Food*. Whereas before the *Dole Food* decision, entities such as petitioner were often afforded protection under the FSIA's majority-ownership test, those entities must now rely exclusively on the immunity for organs of foreign states. See, *e.g.*, *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 199 (3d Cir. 2003) (noting that the district court had initially upheld the defendant's foreign state status under the majority-ownership test, but, after *Dole Food*, had reevaluated the question under the "organ of a foreign state" prong), cert. denied, 541 U.S. 903 (2004); *id.* at 208 ("A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities.").

B. At first glance, the courts of appeals may appear to have adopted similar approaches to determining whether an entity qualifies as an organ of a foreign state. Each considers multiple factors including, *inter alia*, the circumstance of the entity's creation, its purpose, the involvement of the state in its affairs, its employment practices, any financial support or grant of exclusive economic rights from the state, and its privileges and obligations under local law. In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court granted a petition for a writ of certiorari to consider only the question of majority ownership. . . .

A closer study, however, reveals a critical divergence in the manner in which the various circuits apply their seemingly similar tests.

The Third and Fifth Circuits, for example, have emphasized "the need for a * * * flexible approach under the organ prong of section 1603(b)(2)," *USX*, 345 F.3d at 208, and that a court should "*not* apply [the factors] mechanically or require that all five support an organ-determination," *Kelly*, 213 F.3d at 847. Moreover, those courts understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *USX*, 345 F.3d at 209.

The relevance and weight of any particular factor in a given case depends on the extent to which it informs that ultimate test. See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively"). Although the Ninth Circuit also makes reference to "the ultimate question," in practice it proceeds mechanically through a checklist. Its analysis, in full, of the factors as they apply to petitioner in No. 05-85 was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner] offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

Id. at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals disregarded the substantial evidence that petitioner "serves a public purpose" because it did not conform with the result indicated by the court's mechanical application of other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner was serving the interests of the Province.

* * * *

C. A proper analysis of the question demonstrates that petitioner is an organ of the Province. Under the proper approach, the court of appeals should have focused on the fact that petitioner was created for the purpose of marketing for export the Province's excess resource—electric power—including, in particular, marketing Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and providing power to the City of Seattle as required of the Province in the Skagit River Treaty. Rather than emphasizing that the Province does not provide direct financing to petitioner, it should have focused on the fact that petitioner plays an important role in discharging Canada's treaty obligations, that the Province assigned to petitioner its rights to Canada's entitlement under the Columbia River treaty, "a very significant resource," and that petitioner's net income is returned to the Province via BC Hydro's consolidated income statements. Instead of counting against petitioner the fact that its employees are not civil servants, the court should have emphasized that members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and that outside members of petitioner's board "were subject to concurrence by the Office of the Premier." Rather than declaring that petitioner is "not wholly owned by the government," it should have attached significance to the fact that the Province owns 100% of BC Hydro, which in turn owns 100% of petitioner. On a proper analysis, the court of appeals should have concluded that petitioner is an organ of the Province of British Columbia.

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE, AND NO. 05-85 IS AN APPROPRIATE VEHICLE IN WHICH TO RESOLVE IT

A. As noted above, a proper understanding of the "organ" prong is of considerable significance under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status. See *USX*, 345 F.3d at 208 (quoted at p. 8, *supra*). A proper application of that prong is particularly important in this case. Canada is our Nation's largest trading partner, and Canada and its Provinces have numerous crown corporations that engage in trade with the United States. Petitioner was created

by BC Hydro—the Province's statutory agent for the promotion of hydroelectric development—specifically to market BC Hydro's surplus electric power outside the Province, including power the Province is entitled to receive or obligated to provide under treaties between the United States and Canada. Petitioner marketed power valued at approximately $11 billion Canadian between 2000 and 2004, see *ibid.*, and a large part of that power goes to States in the Ninth Circuit. Thus, if the court of appeals' decision is not overturned, it will bind petitioner in virtually all suits brought against it.

* * * *

(ii) Core functions test: Garb v. Poland

In *Garb v. Poland*, 440 F. 3d 579 (2d Cir. 2006), discussed in b.(2) below, the U.S. Court of Appeals for the Second Circuit found that the Ministry of the Treasury of Poland was a part of the foreign state, and not an agency or instrumentality of Poland, as required for the takings exception to immunity under the FSIA to be applicable in that case. In doing so the court adopted what it characterized as a "'core functions' approach" developed by other circuit courts of appeal, as excerpted below.

---

* * * *

a. "Agency or Instrumentality" Under the FSIA

* * * *

In order to satisfy the fourth element of the "takings" exception where, as here, the property at issue is located outside the United States, plaintiffs must show that the property they seek to recover is "owned or operated by an agency or instrumentality of the foreign state." 28 U.S.C. § 1605(a)(3). An "agency or instrumentality of a foreign state" is a term of art to which the FSIA assigns a specific definition, namely "any entity"

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in [28 U.S.C. § 1332(c) and (e)] nor created under the laws of any third country.

28 U.S.C. § 1603(b) (footnote added). Only the first criterion is contested here—namely, whether the Ministry of the Treasury of Poland is "a separate legal person, corporate or otherwise," from the Republic of Poland.

In *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 151 (D.C.Cir.1994), the Court of Appeals for the District of Columbia Circuit . . . determined that, under the FSIA, "armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state." *Id.* at 153.

The Fifth Circuit adopted *Transaero* 's "core functions" approach in another case concerning the FSIA's service of process provisions, holding that "[w]hether an entity is a 'separate legal person' depends upon the nature of its 'core functions'-governmental vs. commercial-and whether the entity is treated as a separate legal entity under the laws of the foreign state." *Magness v. Russian Federation,* 247 F.3d 609, 613 n. 7 (5th Cir. 2001).

* * * *

. . . [T]he *Transaero* Court established that the undisputed purpose of the FSIA was to codify the "'restrictive' theory of sovereign immunity, under which 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.' " *Transaero,* 30 F.3d at 151 (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)). By interpreting "[t]he distinction between foreign states and their instrumentalities" in light of the "two categories of actors that correspond to the restrictive theory's two categories of acts,"

id. at 152, the *Transaero* Court took account of this important historical context, rather than attempting to extract meaning from the FSIA's terms in a vacuum, or engaging in a selective reading of the House Report.

* * * *

Because we agree with the *Transaero* Court that any attempt to extract a literal reading of what is, in the final analysis, an ambiguous statutory provision, will simply have courts running in circles, we conclude that the "core functions" test is the most effective way to remain faithful to Congress's intent in enacting the takings exception to sovereign immunity. . . . [15]

On at least one occasion, the District of Columbia Circuit has applied the "core functions" principle of *Transaero* to determine whether a governmental ministry may be sued in U.S. courts pursuant to 28 U.S.C. § 1605. *See Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 234 (D.C.Cir. 2003). . . .

* * * *

b. The Ministry of the Treasury of Poland Is Not an "Agency or Instrumentality"

Applying the *Transaero* standard to the circumstances of this case, the District Court concluded that "[t]he Ministry of the Treasury would appear to be an integral part of Poland's political structure, and its core function—to hold and administer the property of the Polish state—is indisputably governmental." *Garb,* 207 F.Supp.2d at 35. We agree.

The 1997 Constitution of the Republic of Poland provides for a Council of Ministers charged with conducting the Republic's "internal affairs and foreign policy." *The Polish Constitution: Text and Introduction* 86 (R. van der Wolf ed., 2000) (translating Pol. Const. art. 146) ("*The Polish Constitution* "). . . .

---

[15] . . . We note that, in this appeal, the United States "continue[s] to adhere to the view articulated in the United States' amicus brief in *Transaero*." United States Supplemental Letter at 10.

Among the functions of the Council of Ministers enumerated in Poland's constitution is the "protect[ion of] the interests of the State Treasury." *The Polish Constitution* at 86 (translating Pol. Const. art. 146). Defendants have submitted to the District Court a translation of Article 3.2 of Poland's Law of August 8, 1996 on Exercise of State Treasury Powers, which provides that "[t]he State Treasury, represented by the Minister of the State Treasury, is vested with property rights to state-owned assets, unless separate regulations specify that [an]other state legal entity is vested with such rights." In addition, defendants supplied an affidavit from Leslaw Kostórkiewicz, a former assistant professor of law at the Warsaw Law School and former Director of the Legal Office of the Polish Senate. *See* Kostórkiewicz Aff ¶ 2, J.A. at 225. The affidavit states, in relevant part:

> The Ministry is part of the central government of Poland and exists to act on behalf of the Republic of Poland. By statute, the Ministry manages property, including land, on behalf of the Polish State. It does not hold property separately from the Polish State. The Ministry also represents the Polish State with respect to financial claims brought against the State.

Kostórkiewicz Aff. ¶ 16, J.A. at 230.

Upon review of this evidence, and the full record before us, we find no error in the District Court's finding that the Ministry of the Treasury of Poland is "an integral part of Poland's political structure" and that the Ministry's "core function . . . is indisputably governmental" rather than commercial. *Garb,* 207 F.Supp.2d at 35.

* * * *

We therefore hold that the Ministry of the Treasury of Poland is not "an agency or instrumentality" of the Republic of Poland within the meaning of the FSIA. Accordingly, plaintiffs have not satisfied the fourth element of the FSIA "takings" exception to foreign sovereign immunity.

* * * *

(2) Default judgments

See FG Hemisphere v. DRC, discussed in A.1.d.(3) below.

(3) Waiver: Af-Cap, Inc. v. Republic of Congo

On August 23, 2006, the U.S. Court of Appeals for the Fifth Circuit vacated a district court "turnover" order issued against the Republic of Congo. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006). Excerpts below from the Fifth Circuit opinion provide a brief description of the case and address the lack of *in personam* jurisdiction over the Congo, finding no waiver of immunity, either express or implied.

---

* * * *

This appeal concerns an ongoing battle by Af-Cap, Inc. to receive payment from the Republic of Congo on an outstanding debt. At issue are (1) the district court's dissolution of garnishment writs that would have allowed Af-Cap to garnish royalties owed to the Congo;* (2) a turnover order that requires the Congo to receive monetary payment (as opposed to in kind payment) of the royalties and requires its debtors to pay the royalties into the court

---

* Editor's note: The court found that the dissolution of the writs of garnishment was consistent with Texas state law. On another issue, the court rejected Af-Cap's argument that the "fugitive disentitlement doctrine" required dismissal of this appeal. The court explained:

> In the present case, the policy concerns associated with the doctrine are not served. The underlying foundation of the doctrine is that it deters "disrespect for the legal process." . . . Sovereignty assertions, however, are different than blatant disrespect for the legal process. As explained above, the Congo correctly believed that under the FSIA the district court lacked in personam jurisdiction. The Congo asserts that its position was not designed to be disrespectful. As evidence of that fact, it points to the Congolese minister who promptly informed the court that the country would not obey the turnover order because of sovereignty concerns.

registry; and (3) a contempt order against the Congo for failing to comply with the turnover order.

* * * *

The dissolution of the writs of garnishment and creation of the turnover order require this Court to find a new justification for jurisdiction in this case. In [*Af-Cap v. Republic of Congo,* 383 F.3d 361*, amended on rehearing,* 389 F.3d 503 (5th Cir. 2004) *("Af-Cap II")*], this Court found jurisdiction based on the fact that the obligations were held by the CMS Companies who were located in the United States, and Texas specifically. *Af-Cap II*, 383 F.3d at 371-73. With the turnover order, the district court bypasses the CMS Companies and directly orders the Congo to act. To find *in personam* jurisdiction, this Court must look to the FSIA, which "provides the sole basis for obtaining *in personam* jurisdiction over a foreign state." *Hashemite Kingdom of Jordan v. Layale Enters., S.A.* (*In re B-727 Aircraft Serial No. 21010*), 272 F.3d 264, 270 (5th Cir.2001). In *Af-Cap II*, this Court looked at the FSIA rules for property under § 1610(a); this Court now must look at rules for *in personam* jurisdiction under § 1605(a). As explained below, the FSIA does not allow *in personam* jurisdiction over the Congo.[5]

Section 1605(a) has two relevant provisions to the present case. See 28 U.S.C. § 1605(a)(1) & (2). In § 1605(a)(1), personal jurisdiction over a foreign state exists if the state "has waived its immunity either explicitly or by implication." Id. at § 1605(a)(1). In § 1605(a)(2), personal jurisdiction over a foreign state exists in certain "commercial activity" situations. Id. at § 1605(a)(2). Beginning with § 1605(a)(2), the "commercial activity" exception is foreclosed by reasoning used in *Af-Cap II*. The *Af-Cap II* Court held that the *situs* requirement—required under both § 1610 and § 1605—was only possible because the CMS Companies, holding

[5] Af-Cap suggests that the turnover order should not be a problem because "a virtually identical turnover order" was entered into by the Northern District of Illinois in [another] case. Unlike the present turnover order, however, the Congo consented to the Illinois order. Therefore, the Congo waived any potential personal jurisdiction argument in the NUFI case.

property of the Congo, were located in the United States. Under an analysis of the turnover order, however, the CMS Companies and the property they hold is not considered. The district court, by dissolving the writs and replacing them with a turnover order, lost the original foothold for jurisdiction. The "commercial activity" exception does not apply to the Congo.

Turning to § 1605(a)(1), the loan agreement does not explicitly waive immunity to suit in Texas. (Loan Agreement, § 19). The issue is therefore whether the Congo has implicitly waived immunity to suit in Texas. This Court has identified three circumstances in which a waiver is ordinarily implied: "(1) a foreign state agrees to arbitration in another country; (2) the foreign state agrees that a contract is governed by the laws of a particular country; (3) the state files a responsive pleading without raising the immunity defense." *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir.1993) (internal citation omitted). None of these circumstances is present in this case. First, there is no arbitration agreement. Second, the loan agreement states that it is to be governed by English law, not United States law. Third, the pleadings with regard to the turnover order have consistently raised an immunity defense. If this Court wanted to go outside of the three ordinary circumstances, it must still "narrowly construe" the implicit waiver clause of § 1605(a)(1). *Rodriguez*, 8 F.3d at 287 ("[C]ourts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended.").

In the case at hand, there is no evidence, and certainly no strong evidence, that the Congo implicitly waived immunity to suit in Texas. Af-Cap has failed to argue, much less show, how in personam jurisdiction is appropriate in Texas. Because the district court erroneously held that the Congo waived its immunity, it abused its discretion. Therefore, the turnover order is vacated.

* * * *

(4) Third-party assertion of immunity: Rubin v. Iran

On June 22, 2006, the U.S. District Court for the Northern District of Illinois ruled that third parties holding Iran's property in the United States could not assert foreign sovereign

immunity of the property. *Rubin v. Iran*, 436 F. Supp. 2d 938 (N.D.Ill. 2006). Excerpts below from the court's June decision describe the background of the case and its conclusion on the question of law presented. In a memorandum opinion and order of July 14, 2006, the district court stated: "Following entry of this court's order, the Islamic Republic of Iran filed an appearance, and apparently orally asserted immunity under the FSIA during a status hearing before [the magistrate judge]." 2006 U.S. Dist. LEXIS 53284 (July 14, 2006). Further action was pending at the end of 2006.

---

* * * *

In 2001, the plaintiffs obtained a federal court judgment in a personal injury suit against Iran and several other defendants. The plaintiffs are now attempting to enforce their judgment by seeking to execute or attach various collections of Persian artifacts in the possession of [the University of Chicago, the Field Museum of Natural History, and Gil Stein ("citation respondents")]. . . . Iran loaned the artifacts to the citation respondents in the 1930s and 1960s with the understanding that the collections would be returned after archeological studies were completed.

* * * *

Iran has so far failed to assert its sovereign immunity or even to appear, despite having been given notice of these proceedings. In its absence, the citation respondents have asserted Iran's foreign sovereign immunity under the FSIA to resist the plaintiffs' attempts to execute or attach the Persian artifacts. The plaintiffs responded by filing the instant motion seeking to establish that, as a matter of law, no party other than Iran may assert Iran's sovereign immunity under the FISA.

* * * *

Foreign Sovereign Immunity is an Affirmative Defense

After carefully reviewing the magistrate's report and recommendation, the briefs filed by the parties and the United States, the cases cited, and the FSIA, the court agrees with the magistrate judge's conclusion that foreign sovereign immunity under § 1610

is an affirmative defense. As stated explicitly in a United States House report prepared at the time of the FSIA's passage, foreign sovereign immunity was enacted by Congress as "an affirmative defense which must be specially pleaded." H.R. Rep. No. 94-1487, 9th Cong., 2d Sess., at 17 (1976). . . .

* * * *

The Affirmative Defense of Immunity May Be Asserted Only By Iran

The court agrees not only with the magistrate judge's determination that foreign sovereign immunity under § 1609 is an affirmative defense that must be asserted, but also with the conclusion that the defense may be asserted only by the foreign sovereign. Generally speaking, one party's ability to assert the rights of an absent party are limited. In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the Supreme Court set forth the two-part test that determines whether one party may assert the rights of an absent party. First, the litigant must have suffered an "injury in fact." *Id.* at 411. Second, prudential considerations must favor permitting the litigant to assert the other party's rights. *Id.* These considerations include how close the litigant's relationship is to the missing party, and whether a hindrance has prevented the missing party from asserting its rights itself. *Id.*

* * * *

. . . [U]nder the test set forth in *Powers*, the citation respondents are not entitled to assert Iran's foreign sovereign immunity under 28 U.S.C. § 1609.

* * * *

The Third Circuit opinion noted that the United States had filed its Second Statement of Interest in *Rubin* on March 3, 2006. Excerpts below provide the U.S. views concerning errors in the magistrate's report and recommendation of December 2005 adopted by the court (most footnotes omitted). The full text of the 2006 U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm.*

---

* * * *

The United States now appears again at this stage of the proceedings because—although it is the official policy of the United States to encourage foreign sovereigns to appear when their interests are threatened in U.S. courts to defend those interests—the United States has significant foreign policy interests in ensuring that principles of foreign sovereign immunities are properly interpreted and applied and, moreover, believes that the Magistrate Judge abused his discretion when he refused to impose any burden on the plaintiffs in the circumstances of this case to demonstrate their entitlement to the properties they seek to attach solely because of the foreign sovereign's absence. The United States takes no position on the merits of this dispute. Nor is it defending Iran's behavior. Nevertheless, the decision of the Magistrate Judge, if it is upheld and applied in later stages of these proceedings, undercuts the purposes intended to be served by the Foreign Sovereign Immunities Act, denies to a foreign sovereign the "grace and comity" to which it is ordinarily entitled, and threatens the foreign policy interests of the United States. Because the Court should exercise its discretion to ensure that plaintiffs have met their burden of demonstrating entitlement to the properties at issue here before it orders their turnover, the United States urges that the Court uphold the objections to the opinion of the Magistrate Judge that have been raised by the Citation Respondents.

ARGUMENT

In these post-judgment proceedings, plaintiffs have focused their efforts on seeking attachment of Iranian property under Section 1610(a)(7) of the FSIA, which allows foreign sovereign property to be attached in satisfaction of a judgment entered against a foreign sovereign pursuant to 28 U.S.C. § 1605(a)(7), if that property is used for a commercial activity in the United States. See 28 U.S.C. § 1610(a). . . .

As the United States previously demonstrated in its earlier Statement of Interest, as argued by the Citation Respondents, and as recognized by the Magistrate Judge, "[s]ignificantly, Iran has not been shown to have engaged in commercial activity as to the items in question." . . . Thus, there has been no demonstration that the property plaintiffs seek to attach in these proceedings meets

the threshold statutory requirement of the FSIA. Plaintiffs, however, contend that they need not make any such demonstration because the sovereign had not appeared in these proceedings and no one else has "standing" to raise the sovereign's immunity.

The Magistrate Judge, in his December 15, 2005, opinion agreed with this argument. The Magistrate Judge's opinion is grounded in his finding that sovereign immunity is an affirmative defense that is personal to the sovereign and as to which the sovereign bears the burden. . . .

The Magistrate Judge's opinion . . . is flawed. The statutory presumption of sovereign immunity is applicable to the property at issue in these proceedings and plaintiffs should have been required to meet their burden of demonstrating that one of the statutory exemptions to that presumption applies, regardless of the presence of the foreign sovereign in this litigation. This is so for a number of reasons. First, the FSIA codifies, as a matter of substantive law, the interests of "grace and comity" that are the underpinnings of the doctrine of foreign sovereign immunity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("foreign sovereign immunity is a matter of grace and comity on the part of the United States"). Moreover, "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Id.* at 493. Thus, the FSIA contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities," *id.* at 488, and, critically, "specifies the circumstances under which attachment and execution may be obtained against the property of foreign states." *Id.* at 495 n.22. In all cases—whether the topic is a sovereign's immunity from suit or the immunity of a sovereign's property—the baseline presumption adopted by the FSIA is that the sovereign is immune. *See, e.g.,* 28 U.S.C. §§ 1604, 1609; see also id. § 1611 (describing additional immunities).

Citation Respondents have correctly noted that the attachment provisions of the FSIA are a significant departure from the traditional practice. Historically, both sovereigns and their property have been considered completely immune from judicial proceedings in

the United States. *See Verlinden*, 461 U.S. at 486 (*citing The Schooner Exchange v. McFaddon*, 7 Cranch. 116, 3 L. Ed. 287 (1812)). . . . The FSIA preserved the traditional distinction between two different aspects of sovereign immunity: jurisdictional immunity—that is, a foreign sovereign's immunity from actions brought in United States courts—and immunity from attachment—a foreign sovereign's immunity from having its property attached or executed upon. With respect to attachment immunity, the FSIA departs from the long-standing practice of affording complete immunity to foreign sovereign property and, instead, "partially lower[s] the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity." H.R. Rep. No. 94-1487, at 19; *Connecticut Bank of Commerce*, 309 F. 3d at 252. In making this alteration in the FSIA, however, Congress intended to lift the historical immunity only "in part" and did not intend to "reverse completely the historical and international antipathy to executing against a foreign state's property even in cases where a judgment could be had on the merits." *Id.; accord DeLetelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (finding that Congress, in certain circumstances, created a "right without a remedy" where plaintiff could avoid sovereign immunity and obtain judgment against foreign state under FSIA but could not avoid sovereign immunity when seeking to execute on that judgment). Thus, contrary to the Magistrate Judge's opinion, cf. Mem. Op. at 22, it is more difficult, and not less, to seek to execute on foreign sovereign property than it is to obtain a judgment against a foreign state.

The reason for the very circumscribed nature of the lifting of the ordinary immunity of foreign sovereign property contemplated by the FSIA is obvious: judicial incursion on a foreign sovereign's property is often likely to be far more problematic from a foreign relations point of view than simply requiring the sovereign to appear to defend a lawsuit on the merits. Thus, the sensitive foreign relations considerations associated with the partial lifting of sovereign immunity embodied in the FSIA were carefully weighed by Congress in circumscribing the limits within which a foreign sovereign's property might be attached, and the baseline presumption that Congress adopted was that foreign sovereign property

was to be treated as immune. 28 U.S.C. § 1609. The most fundamental criterion to be applied if that baseline immunity is to be overcome is that the property must be used in the United States for commercial purposes. *See* 28 U.S.C. § 1610(a) (setting this as the antecedent condition for all other exemptions). This limitation is directly reflective of the restrictive theory of sovereign immunity adopted by the United States and is intended to ensure that only the commercial property and not the public property of foreign sovereigns is made available for attachment in U.S. courts. Moreover, the limitation reflects the practical knowledge that U.S. property located abroad will be subject to reciprocal treatment. Inconsistent application of the restrictive theory of sovereign immunity by allowing the attachment of foreign sovereign property that does not fall within the terms of that theory, thus, has the potential to jeopardize U.S. efforts to protect its own property located abroad.

Where Congress has directly indicated its intent to limit the attachment of foreign sovereign property in this matter, and has done so for purposes of protecting the foreign policy interests of the nation, the court errs if it fails to ensure that the plaintiffs' effort to attach particular property comes within the terms of the FSIA. In other words, the sovereign immunity reflected in Sections 1609 and 1610 of the FSIA does not constitute an affirmative defense of the sort the Magistrate Judge assumed. To the contrary, the presumption of immunity afforded by Section 1609 arises whenever the property of a foreign state is at issue, and here, Iran's status as a foreign sovereign is not only undisputed, it is a necessary element to plaintiff's request for ultimate relief in the form of turnover of Iran's assets. Plaintiffs seeks to execute on a judgment against the Republic of Iran, a judgment which was founded on an exception to the ordinary presumption against foreign sovereign immunity as to jurisdiction. See Mem. Op. at 2 (describing the bases for plaintiffs' judgment); *Campuzano v. Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003) (making findings of fact and conclusions of law relevant to the *Rubin* plaintiffs); 28 U.S.C. § 1605(a)(7). Thus, plaintiffs can obtain property in satisfaction of that judgment only if the property belongs to Iran, and both plaintiff's judgment and their claim to the property at issue here are

predicated on the recognition that Iran is a foreign sovereign. In short, plaintiffs concede the only fact necessary for presumptive immunity to attach, and Iran's presence should not have been found necessary to judicial review of that presumption. *See Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004) (finding the sovereign's presence or absence "irrelevant" for purposes of applying presumption of sovereign immunity in an attachment context), *cert. denied*, ___ U.S. ___, 125 S. Ct. 1841(2005); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997) ("defendants . . . are entitled to a presumption of immunity if they are foreign states within the meaning of the Act."); *see also Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005) (finding that immunity was presumptively invoked upon a finding that the party entitled to the immunity "satisfied the FSIA's definition of a foreign state"), cert. denied, ___ S. Ct. ___, 2006 WL 386482 (Feb. 21, 2006); *accord Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002).

Once presumptive immunity attaches, "the burden of going forward shifts to the plaintiff to produce evidence that the entity is not entitled to immunity." *Enoharo*, 408 F.3d at 882; *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1383 (5th Cir. 1992); *accord Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1271 (10th Cir. 2003). Where "grace and comity" warrant the recognition of foreign sovereign immunity, where the United States' foreign policy interests favor ensuring that the terms of the FSIA are given full effect, and where plaintiffs concede—as they must in the context of these proceedings—the only fact necessary to the invocation of sovereign immunity, the Magistrate Judge erred in not recognizing the presumption of immunity, which plaintiffs then bear the burden to overcome.

* * * *

In these circumstances, this Court should ensure that plaintiffs meet their burden of showing that the property is subject to attachment. In other words, plaintiffs should be required to demonstrate that the property they seek in satisfaction of their judgment against Iran is . . . property used for a commercial activity in the United States by Iran. As the United States previously demonstrated in its

earlier Statement of Interest, as argued by the Citation Respondents, and as recognized by the Magistrate Judge, "[s]ignificantly, Iran has not been shown to have engaged in commercial activity as to the items in question." Mem. Op. at 3, *see also* Statement of Interest of the United States, Docket No. 20, at 11-13. Unless plaintiffs can make that threshold demonstration, as required by the FSIA, any property at issue in these proceedings belonging to Iran should be deemed exempt from the FSIA's attachment provisions.

* * * *

b. Exceptions to immunity under the FSIA

(1) Commercial activity: Garb v. Poland

In *Garb v. Poland,* 440 F.3d 579 (2d Cir. 2006), discussed below, the court found the commercial activity exception to the FSIA inapplicable "because (a) a state's confiscation of property within its borders is not a 'commercial' act, (b) the subsequent commercial treatment of expropriated property is not sufficiently 'in connection with' the prior expropriation to satisfy the 'commercial activity' exception, and (c) we decline to credit plaintiffs' recharacterization of what are in essence 'takings' claims as "commercial activity" claims." *See also FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), discussed in d.(3) below.

(2) Expropriations: Garb v. Poland

In *Garb v. Poland*, 440 F.3d 579 (2d Cir. 2006), the U.S. Court of Appeals for the Second Circuit found no applicable exception to immunity under the FSIA. The appellate court explained the case and its status as follows:

> Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) dismissing their claims against the Republic of Poland and the Ministry of the Treasury

of Poland for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Garb v. Republic of Poland*, 207 F.Supp.2d 16 (E.D.N.Y.2002). Plaintiffs' claims, which at the pleadings stage we accept as true in all respects, *see, e.g., Hallock v. Bonner*, 387 F.3d 147, 150 (2d Cir.2004), arise from the mistreatment of Jews in Poland after the Second World War—mistreatment that Chief Judge Korman properly described as "horrendous." *Garb*, 207 F.Supp.2d at 17. In particular, plaintiffs challenge the Polish Government's expropriation of their property following the asserted enactment of post-war legislation designed for that purpose. *Id*. at 18.

* * * *

Following a remand from the Supreme Court, *see Republic of Poland v. Garb*, 542 U.S. 901, 124 S.Ct. 2835, 159 L.Ed.2d 265 (2004), we consider for the second time whether plaintiffs' claims fall under these statutory exceptions. [Since] . . . our previous disposition of this matter . . . the question of the FSIA's retroactivity has been resolved in the affirmative, see *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). Accordingly, we now apply the FSIA retroactively to claims arising from events that took place prior to that statute's 1976 enactment.

Excerpts below provide the court's analysis in concluding that it lacked jurisdiction because neither the commercial activity nor the takings exception to immunity under the FSIA apply (references to other submissions in the case and most footnotes omitted). See also a.(1)(ii) supra for the court's conclusion that the Ministry of the Treasury of Poland is not an "agency or instrumentality" of Poland within the meaning of the FSIA and as required by the FSIA takings exception to immunity.

---

* * * *

Plaintiffs assert that the District Court may exercise jurisdiction over their claims pursuant to 28 U.S.C. § 1605(a)(2), . . . the

"commercial activity" exception of the FSIA. Under this provision, a plaintiff may establish an exception to the immunity of a foreign sovereign defendant if his claims are "based upon"

> [1] a commercial activity carried on in the United States by the foreign state; or upon
> [2] an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon
> [3] an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). Plaintiffs rely on the third of these three alternative grounds.

As a threshold step in assessing plaintiffs' reliance on the "commercial activity" exception, we must identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims. The District Court found that, regardless of the subsequent commercial treatment of the expropriated property, plaintiffs' claims are "based upon" the acts of expropriation.[7] *See Garb,* 207 F.Supp.2d at 31 ("Plaintiffs' claims . . . are 'based upon' the manner in which the property was obtained, not its subsequent management."). We agree with this description of plaintiffs' claims. . . .

We also agree with the District Court that the expropriations by defendants do not fall within the "commercial activity" exception of the FSIA. Expropriation is a decidedly sovereign—rather than commercial—activity. . . .

Moreover, plaintiffs' property was not expropriated "in connection with a commercial activity of the foreign state." The statutory term "in connection," as used in the FSIA, is a term of art,

[7] We intend the term "expropriation" to include acts "against individual property" that are carried out "on a wide scale and impersonally" and are "commonly referred to as 'nationalization.'" *See* F.V. García-Amador, Louis B. Sohn & R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 48 (1974).

and we interpret it narrowly. Accordingly, we have noted that "[a]cts are 'in connection' with . . . commercial activity so long as there is a 'substantive connection' or a 'causal link' between them and the commercial activity." *Hanil Bank v. Pt. Bank Negara Indonesia (Persero),* 148 F.3d 127, 131 (2d Cir.1998) (quoting *Adler v. Fed. Republic of Nigeria,* 107 F.3d 720, 726 (9th Cir.1997)); *see also Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari,* 12 F.3d 317, 330 (2d Cir.1993) (declining to read "the 'connection' language of § 1605(a)(2) . . . to include tangential commercial activities to which the 'acts' forming the basis of the claim have only an attenuated connection").

Concededly, the expropriation of property from plaintiffs—indeed, from anyone who claims unlawful taking of property—is, in some sense, "connected" to any subsequent commercial treatment of that property or its proceeds. Had there been no expropriation, there would have been no properties to treat in a commercial manner; in the circumstances presented here, Poland would have no properties to manage or sell. Such a connection, however, is simply too "attenuated," and not substantive enough, to satisfy § 1605(a)(2). *See Drexel,* 12 F.3d at 330; *see also Stena Rederi AB v. Comision de Contratos,* 923 F.2d 380, 387 (5th Cir.1991) (holding that the "in connection with" requirement of the "commercial activity" exception was not satisfied where "the few commercial acts on which [the plaintiff] relies for its argument that [the defendant] has no sovereign immunity are unrelated to the facts on which [the plaintiff] relies for its causes of action").

* * * *

Finally, we reject plaintiffs' assertion that the "commercial activity" exception applies to their claims because this assertion simply recharacterizes plaintiffs' "takings" argument. Federal courts have repeatedly rejected litigants' attempts to establish subject matter jurisdiction pursuant to other FSIA exceptions when their claims are in essence based on disputed takings of property. . . . Accordingly, we hold that the District Court lacked subject matter jurisdiction over plaintiffs' claims pursuant to the FSIA's "commercial activity" exception and proceed to consider whether plaintiffs' claims fall within the FSIA's "takings" exception.

IV. The "Takings" Exception to Presumptive Foreign Sovereign Immunity (28 U.S.C. § 1605(a)(3))

To establish subject matter jurisdiction pursuant to the "takings" exception of the FSIA, a plaintiff must demonstrate each of four elements:

(1) that rights in property are at issue;
(2) that the property was "taken";
(3) that the taking was in violation of international law; *and either*
(4)(a) "that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," *or*
(4)(b) "that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]"

28 U.S.C. § 1605(a)(3); note 4, *ante; see also Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 251 (2d Cir.2000) (specifying criteria for the "takings" exception of the FSIA).

* * * *

. . . [P]laintiffs rely on the second clause of the fourth element, which permits a plaintiff to bring suit against an "agency or instrumentality of [a] foreign state," provided that the agency or instrumentality "own[s] or operate[s]" the property in question and "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The District Court concluded that, "as plaintiffs concede, the Republic of Poland is not an 'agency or instrumentality' of a foreign state," because it is "the foreign state itself." *Garb,* 207 F.Supp.2d at 34. Thus, the question before the District Court was whether the other defendant, Poland's Ministry of the Treasury, "is, on the one hand, the foreign state itself or a subdivision of it, or, on the other hand, an 'agency or instrumentality' of the Republic of Poland and therefore potentially subject to jurisdiction under the second clause" of the fourth element of the "takings" exception. *Id.* at 34-35. In the circumstances of this case, the District Court

doubted whether "the Ministry of the Treasury can be viewed as a legal entity separate from the Republic of Poland" and therefore held that "permitting the cause of action here would appear to undermine the immunity Congress intended to confer on the Republic of Poland under the FSIA." *Id.* at 38. On appeal, plaintiffs maintain that "[t]he Treasury is an agency and instrumentality of the Polish Government" within the meaning of § 1605(a)(3), Appellants' Br. at 15, and therefore may be sued in United States courts.

Because we hold that the Ministry of the Treasury of Poland is not an "agency or instrumentality" of the Republic of Poland, plaintiffs' claims fail to satisfy the fourth element of the "takings" exception, and we need not consider the questions of international law raised under the third element.

(3) Certain acts of terrorism

In 1996 Congress amended the FSIA to provide a limited exception to sovereign immunity in certain circumstances in U.S. courts for claims resulting from acts of state-sponsored terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"or "Antiterrorism Act"), Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. § 1605(a)(7), created an exception to foreign sovereign immunity in claims "for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such act (as defined in § 2339A of title 18) if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." The exception was made available only for states "designated as state sponsors of terrorism under § 6(j) of the Export Administration Act of 1979 (50 U.S.C. app. § 2405(j)) or § 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred, unless later so designated as a result of such act." At the time of enactment seven states were so designated: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. Iraq and Libya have since been removed from the list.

Subsequently, Congress adopted a provision creating a private right of action against officials, employees, or agents of a designated foreign state:

> (a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . . for money damages which may include economic damages, solatium, pain and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

Civil Liability for Acts of State Sponsored Terrorism, § 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No.104–208, 110 Stat. 3009 – 172 (1996), *reprinted at* 28 U.S.C.A. § 1605 note (West Supp. 1997). The provision is referred to as the Flatow Act (and sometimes as the Flatow "Amendment" although in fact it amends no law) in recognition of the family of Alisa Flatow, an American who died as the result of a terrorist bombing in Gaza.

(i) Sudan: Owens v. Sudan

On March 29, 2005, the District Court for the District of Columbia denied defendants' motion to dismiss and allowed the plaintiffs to submit an amended complaint, in a case brought under FSIA §1605(a)(7) related to the August 1998 bombing of the U.S. embassies in Tanzania and Kenya. *Owens v. Sudan*, 374 F. Supp. 2d 1 (D.C. Cir. 2005). *See Digest 2005* at 517-21. Plaintiffs in the case, all U.S. citizens claiming personal injuries resulting from the bombings, filed an amended complaint in May 2005. On January 26, 2006, the court denied a motion by defendants to dismiss the amended complaint. 412 F. Supp. 2d 99 (D.D.C. 2006). Excerpts below from the court's opinion describe the amended complaint and the issues before the court.

---

* * * *

. . . [The amended] complaint contends that defendants furnished material support, in the form of "cover, sanctuary, technical assistance, explosive devices and training," to al Qaeda and Hizbollah, the two terrorist organizations alleged to have carried out the embassy bombings. . . . As to the Sudan defendants in particular, the complaint alleges that they "entered into an agreement with al Qaeda and Hezbollah under which those organizations received shelter and protection from interference while carrying out planning and training of various persons for terrorist attacks, including the attacks of August 7, 1998." . . . The complaint goes on to allege specifically (albeit in terms that are somewhat imprecise with respect to timing) a series of actions taken by agents of the government of Sudan to furnish Osama bin Laden, the putative leader of al Qaeda, and his associates with shelter, security, financial and logistical support, and business opportunities. . . . Those actions, plaintiffs contend, led directly to the 1998 embassy bombings in Nairobi and Dar es Salaam and, therefore, not only are sufficient to divest the Republic of Sudan of sovereign immunity under 28 U.S.C. § 1605(a)(7), but also will support substantive claims for assault and battery, intentional infliction of emotional distress, and loss of consortium under the common law of the plaintiffs' respective home states.

* * * *

The allegations of the present complaint make clear that this Court's jurisdiction over the claims against the Sudan defendants, if it exists at all, must be based on "the provision of material support or resources" by Sudan's agents for an act of "extrajudicial killing"—as opposed to the actual commission by its agents of an extrajudicial killing. To satisfy the "material support or resources" clause of the terrorism exception (and thus to establish this Court's subject-matter jurisdiction), the Court must find the following:

(1) that personal injury or death occurred (and that either the victim or the claimant was a United States national at the time);
(2) that an official, employee, or agent of a foreign state that the United States designated as a sponsor of terrorism—while

acting within the scope of his office, employment, or agency—provided material support or resources for an act of extrajudicial killing;
(3) that the personal injury or death was caused by that provision of material support; and
(4) that the personal injury or death occurred outside the foreign state's territory or, if it occurred within the foreign state's territory, that the foreign state was given a reasonable opportunity to arbitrate the claim.

. . . [T]he Sudan defendants dispute only the second and third of these jurisdictional elements. Specifically, they assert that plaintiffs' allegations that the Sudan defendants provided "material support and resources" to al Qaeda and Hizbollah do not fit within the definition provided by 18 U.S.C. § 2339A. They also challenge the adequacy of the pleadings with respect to agency, arguing that the complaint fails to make specific factual statements to back up the claim that officials, employees, or other agents of Sudan acted within the scope of their governmental duties. Finally, the Sudan defendants contend that plaintiffs have not pleaded facts sufficient for the Court to find a legally cognizable causal link between the alleged material support and the injuries underlying the claims.

* * * *

In reaching its decision to deny the Sudan defendants' motion to dismiss the amended complaint, the court necessarily engaged in a heavily fact-specific analysis. The court found that plaintiffs' statements of fact in the amended complaint "were sufficiently detailed to put the defendants on notice of the specific misconduct with which they are charged (and thereby to permit defendants to craft a reasonable response) and also to allow the Court to determine whether the alleged misconduct satisfies jurisdictional prerequisites."

The court concluded that there was "no basis to dismiss the complaint on the ground that plaintiffs' claims are incapable of satisfying the jurisdictional requirement of 'provision of material support or resources' by the Sudan defendants"; that allegations concerning "any Sudanese official, employee,

or agent engaged in actions constituting 'material support' while acting within the scope of his or her government-conferred authority" were sufficient to withstand dismissal; and that "because the Sudan defendants' conduct, if proven, could be considered a factual cause of plaintiffs' injuries, and because the injuries were within the scope of harm that makes such conduct tortious, the Sudan defendants are not entitled to dismissal of the claims based on the absence of jurisdictional causation."

(ii) Iran: Heiser v. Iran

On December 22, 2006, the U.S. District Court for the District of Columbia entered a default judgment against the Islamic Republic of Iran, the Iranian Ministry of Information and Security ("MOIS"), and the Iranian Islamic Revolutionary Guard Corp ("IGRC") for damages from the June 25, 1996, bombing at Khobar Towers, a residence on a U.S. military base in Dhahran, Saudi Arabia. *Heiser v. Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006). Plaintiffs in the case were family members and estates of 17 of the 19 servicemen killed in the attack.*

Excerpts below from the court's opinion address the court's FSIA-related conclusions (footnotes and citations to submissions in the case have been omitted). The opinion also includes, among other things, analyses of each of the specific claims under applicable law of thirteen states of the United States.

* * * *

* In a separate proceeding, referred to in this opinion, one of the other servicemen and his parents were awarded a default judgment against the same defendants on September 29, 2006. *Blais v. Iran*, 2006 U.S. Dist. LEXIS 71387 (D.D.C. 2006). *See also Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 158 (D.D.C. Mar. 28, 2006) entering a default judgment against Iran, MOIS and IRGC for the death of a U.S. serviceman in the October 23, 1983, terrorist attack on the Marine barracks in Beirut, Lebanon.

In order to subject a foreign sovereign to suit under section 1605(a)(7), plaintiffs must show that: (1) the foreign sovereign was designated by the State Department as a "state sponsor of terrorism"; (2) the victim or plaintiff was a U. S. national at the time the acts took place; and (3) the foreign sovereign engaged in conduct that falls within the ambit of the statute. *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 158 (D.D.C. Mar. 28, 2006).

Each of the requirements is met in this case. First, defendant Iran has been designated a state sponsor of terrorism continuously since January 19, 1984, and was so designated at the time of the attack. *See* 31 C.F.R. § 596.201 (2001); *Flatow* [*v. Islamic Republic of Iran*, 999 F. Supp. 1, 11, (D.D.C. 1998)]. Second, the plaintiffs have described themselves as "the Estates and family members" of 17 of the 19 servicemen who were killed on June 25, 1996, after "Hizbollah terrorists detonated a 5,000 pound truck bomb outside of Khobar Towers, a United States military complex in Dhahran, Saudi Arabia." Both the plaintiffs and the victims to which they are related were United States nationals at the time the bombing occurred. Finally, defendant Iran's support of an entity that committed an extrajudicial killing squarely falls within the ambit of the statute. Defendants MOIS and the IRGC are considered to be a division of [the] state of Iran, and thus the same determinations apply to their conduct. *Roeder*, 333 F.3d at 234; *see also Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 116 (D.D.C. 2005) (Bates, J.) (analogizing the IRGC to the MOIS for purposes of liability, and concluding that both must be treated as the state of Iran itself).

Personal jurisdiction exists over a non-immune sovereign so long as service of process has been made under section 1608 of the FSIA. . . . In this case, service of process has been made. Accordingly, this Court has *in personam* jurisdiction over defendants Iran, MOIS, and IRGC.

* * * *

Previously, this Court has awarded damages to United States service members who were injured or killed as a result of state-sponsored terrorist attacks and their families. In *Peterson*, this Court held that a service member and his or her family may recover

under the state-sponsored terrorism exception to the FSIA only if the service member was a non-combatant not engaged in military hostilities. There, the Court established a two-prong test to determine whether a military service member was a non-combatant. Under this test, a service member is deemed a non-combatant if he or she was: (1) engaged in a peacekeeping mission; and (2) operating under peacetime rules of engagement. *Peterson* [*v. Islamic Republic of Iran*], 264 F. Supp. 2d [46 (D.D.C. 2003)]at 60.

Here, plaintiffs have conclusively demonstrated that the servicemen who died at the Khobar Towers satisfy the two-prong test under *Peterson*. Colonel Douglas Cochran testified on December 2, 2003, that the service members who died at the Khobar Towers were deployed as a part of a peacekeeping mission sanctioned by United Nations Resolutions. He also stated that the decedents were operating under standing rules of engagement, under which the decedents did not have the right to participate directly in hostilities. . . . Therefore, this Court finds that plaintiffs are not excluded from recovering under the state-sponsored terrorism exception to the FSIA.

* * * *

V. Liability

A. Proper Causes of Action Under the FSIA

Once a foreign state's immunity has been lifted under Section 1605 and jurisdiction is found to be proper, Section 1606 provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Section 1606 acts as a "pass-through" to substantive causes of action against private individuals that may exist in federal, state or international law. *Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *8-10, 2005 U.S. Dist. LEXIS 5343, at *27-32 (D.D.C. Mar. 29, 2005) (Bates, J.) [hereinafter *Dammarell II*].

In this case, state law provides a basis for liability. First, the law of the United States applies rather than the law of the place of the tort or any other foreign law because the United States has a "unique interest" in having its domestic law apply in cases involving

terrorist attacks on United States citizens. *See Dammarell II*, 2005 WL 756090, at *20, 2005 U.S. Dist. LEXIS 5343, at *63.

* * * *

(iii) Iraq: Vine v. Republic of Iraq

On September 7, 2006, the U.S. District Court for the District of Columbia denied Iraq's motion to dismiss plaintiffs' state common law and foreign law claims alleging hostage-taking and torture. *Vine v. Republic of Iraq*, 439 F. Supp. 2d 10 (D.D.C. 2006). Excerpts below from the court's opinion provide the background for the allegations and the court's analysis in denying defendants' motion to dismiss *Vine* (most footnotes and citations to submissions in the case omitted). Two other cases consolidated with *Vine* were dismissed on statute of limitations grounds.

---

* * * *

. . . Immediately [after Iraq's invasion of Kuwait on August 2, 1990], Saddam Hussein, then-President of Iraq, issued a directive prohibiting all foreign nationals, including more than 2,000 American citizens, from leaving Iraq and Kuwait. In both countries, American citizens were denied access to their passports, refused exit visas, and physically prevented from leaving the cities of Baghdad and Kuwait City by the use of roadblocks. Approximately two weeks later, Hussein ordered all American citizens to report to hotels in those two cities. Those who obeyed his order, as well as others captured by Iraqi authorities, were forcibly relocated to strategic sites in Iraq where they served as "human shields" to prevent an attack by the allied forces. Additionally, a large number of Americans sought safe haven from Iraqi military forces by seeking refuge in either diplomatic properties or in private residences and "safehouses" throughout Kuwait and Iraq.

On August 19, 1990, President George H.W. Bush declared that all United States citizens in Kuwait and Iraq, regardless of whether they were in the physical custody of Iraqi forces, were

"hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. President Bush demanded that Hussein release all American citizens and warned that the Iraqi government would be responsible for their safety and well-being.

* * * *

On September 1, 1990, as a result of the illegal seizure and detention of American citizens in Kuwait and Iraq, the U.S. Department of State designated Iraq a "terrorist state" under 50 U.S.C. § 2405(j).

. . . The hostage situation ultimately came to an end in the second week of December 1990 when Hussein ordered the release of the last group of approximately 250 American hostages.

During their captivity, the American hostages were subject to conditions of confinement that were "harsh, cruel, degrading, and often terrorizing." These hostages "lived in constant fear for their lives and suffered from fatigue, depression, severe anxiety and stress, and the loss of the companionship of their loved ones." *Id.*

* * * *

Hostage taking is defined in § 1605(e) of FSIA to have "the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages." 28 U.S.C. § 1605(e)(2). Article 1 of the International Convention Against the Taking of Hostages, in turn, states:

> Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages.

U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979). Iraq insists that at least 170 of the *Vine* plaintiffs—those who were not physically held by Iraqi forces but rather received sanctuary at various diplomatic premises or found haven in private safehouses after the

invasion of Kuwait—were not "seized" or "detained" by Iraq and that, even assuming they were, the purpose of such "detention" was not to compel a third party to do or refrain from doing something. Accordingly, Iraq insists that FSIA does not waive its immunity with respect to the claims of these plaintiffs and their claims must be dismissed. The court disagrees.

As the Fifth Circuit has held, "a hostage is 'seized' or 'detained' . . . when she is held or confined against her will for an appreciable period of time." *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991). In an analogous criminal case, the Second Circuit clarified that the government "need not show that the defendant actually used physical force or violence to restrain that person" in order to prove that a hostage was held against her will. *United States v. Si Lu Tian*, 339 F.3d 143, 153 (2d Cir. 2003). Rather, all that is necessary is evidence that "the defendant threatened, frightened, deceived or coerced his hostage so as to cause the hostage to remain under the defendant's control." *Id.; see also Carrion-Caliz,* 944 F.2d at 227 (holding that the victims were taken hostage when the defendant "frightened or deceived them sufficiently to cause them to remain in his house").

Moreover, as Judge Jackson wrote in the *Hill* litigation, the "essence of the tort of hostage taking is false imprisonment," 175 F. Supp. 2d at 46, which is defined in the District of Columbia as the unlawful "detention or restraint of one against his will, within boundaries fixed by the defendant." *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147, 150 (D.C. 1979); see also *Abourezk v. New York Airlines*, Inc., 283 U.S. App. D.C. 34, 895 F.2d 1456, 1458 (D.C. Cir. 1990). In this context, a plaintiff is detained whenever the defendant "deprive[s] the plaintiff of his freedom of locomotion for any length of time by force or threat of force." *Dist. of Columbia v. Gandy*, 450 A.2d 896, 899 (D.C. 1982). All the *Vine* plaintiffs, even those not in the physical control of Iraq, are alleged to have been deprived of their freedom of locomotion by being constructively confined, by force or threat of force, to safehouses and diplomatic properties.

Furthermore, those plaintiffs who were not in the physical custody of Iraq assertedly "spent most of their time in detention hiding in private residences and 'safehouses'" where they lived "under

harsh conditions and in constant fear of being discovered by Iraqi security forces." It is a reasonable inference from these allegations that such deprivation of freedom was "against their will." As such, all of the *Vine* plaintiffs—even those not under Iraq's direct control—were "seized" or "detained" within the meaning of the FSIA.

Iraq's second argument—that those plaintiffs who were not in the physical custody of Iraq were not hostages given that the purpose of their alleged detention was not to compel a third party to do or refrain from doing something—is likewise unconvincing. The *Vine* plaintiffs' Third Amended Complaint ["TAC"] certainly includes allegations that all plaintiffs were used to extract concessions from the United States. Specifically, the *Vine* plaintiffs allege that all Americans, including those forced into hiding by Iraq's actions, were used by Saddam Hussein to "compel the United States and other foreign states to abstain from launching an armed attack upon Iraq as an explicit or implicit condition for the[ir] release." These allegations are sufficient, at this point in the litigation, to establish that those in hiding were used "in order to compel" the United States "to do or abstain from doing an act."

For these reasons, the court agrees with Judge Jackson's legal conclusion in the *Hill* litigation—litigation involving identical allegations as those found here—that "American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990," including those who took refuge in safehouses and diplomatic properties, were " 'hostages' within the meaning of the FSIA" because they were "kept against their will," were "unable to move about freely," and were used "as bargaining commodities—to extract concessions from the United States and its coalition allies in exchange for their release." *Hill,* 175 F. Supp. 2d at 39, 46-47.

In reaching this decision, the court finds comfort in the fact that the position of the executive branch of the United States government at the time of the Kuwait invasion was that the Americans detained in Kuwait and Iraq were, in fact, "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. . . . Although not binding on this court, the executive branch's view is

owed some deference. . . . Moreover, in another context, Congress afforded "hostage status" to all U.S. citizens trapped inside Iraq or Kuwait who were "held in custody by governmental or military authorities" of Iraq or who took "refuge within [Iraq or Kuwait] in fear of being taken into such custody." Pub. L. No. 101-513, Tit. V, § 599C, 104 Stat. 1979, 2065 (Nov. 5, 1990).

Having concluded that this court may exercise subject matter jurisdiction over the claims of *all* plaintiffs against Iraq in this consolidated matter, the court will proceed to address Iraq's other arguments in favor of dismissal.

C. The Political Question Doctrine

* * * *

This case does not require an evaluation of any executive or congressional policy decision or value judgment. Rather, it involves the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President. "[G]iven the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist [states] in federal court, . . . resolution of this matter will not exhibit 'a lack of respect due coordinate branches in government.'" *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1991) (quoting *Baker*, 369 U.S. at 217) (holding that the political question doctrine does not apply to claims under the Anti-Terrorism Act for acts of terrorism perpetrated by the PLO).

Moreover, the efforts of the government to rebuild Iraq, simply put, are irrelevant to a determination of Iraq's liability under FSIA. Congress explicitly gave the courts jurisdiction over claims where the defendant, a foreign sovereign, was designated as a state sponsor of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7)(A). By focusing on the foreign sovereign's designation at the time the act occurred, as opposed to when the suit is pending, Congress chose to allow a plaintiff to pursue claims against even those foreign nations whose sponsorship of terrorism ceases. For these reasons, the court declines to "convert what is essentially an ordinary tort suit into a non justiciable political question" merely because

its claims "arise in a politically charged context." *Klinghoffer*, 937 F.2d at 49.

* * * *

E. Failure to State a Claim

In their third amended complaint, the *Vine* plaintiffs assert a claim based on federal statutory law, three claims based on federal common law, three claims based on state common law, and four claims based on foreign law. Iraq insists that these claims are either not legally cognizable or are not applicable to the facts at hand, and accordingly moves to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Based on the following analysis, the court agrees in part, and will dismiss the federal statutory and federal common law claims.

1. Federal Statutory Law

Count II of the *Vine* TAC alleges that Iraq violated the so-called Flatow Amendment, through which Congress created a specific cause of action against any "official, employee, or agent of a foreign state" for acts over which the court may maintain jurisdiction under the state-sponsored terrorism exception to sovereign immunity. 28 U.S.C. § 1605 note. The Flatow Amendment is not a statute of "general application" but instead, by its plain language, limits its scope to "officials or agents of foreign states." *Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, *93 (D.D.C. Mar. 29, 2005). Recognizing this limitation, the D.C. Circuit has held that neither the state-sponsored terrorism exception of FSIA, "nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Cicippio-Puleo*, 353 F.3d at 1033. As the sole defendant in the *Vine* matter is a foreign government, and not an official or agent of that foreign government, Iraq moves to dismiss the Flatow Amendment claim in the *Vine* TAC.

Despite the fact that the text of the Flatow Amendment does not directly create a cause of action against a government defendant, the *Vine* plaintiffs nonetheless argue that Iraq can be held liable indirectly, by way of § 1606 of FSIA. Section 1606 provides that, as to any claim for relief with respect to which a foreign state

is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.[16] This judicial officer has previously rejected a similar argument and held that the Flatow Amendment should not be expanded to apply to foreign states through application of § 1606. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2006 U.S. Dist. LEXIS 58033, at *35-42 (D. D.C. May 11, 2006). In so holding, this court adopted the reasoned decision of Judge Bates in *Dammarell v. Islamic Republic of Iran*, who had provided four reasons why "the cause of action in the Flatow Amendment cannot be read to apply to foreign states through section 1606": (1) the text of the Flatow Amendment applies only to officials, employees, or agents of a foreign state, not a foreign state itself; (2) the legislative history does not contain any indication that Congress nonetheless intended to create a private cause of action against a foreign state; (3) the statute does not "obviously extend to private individuals within the meaning of section 1606," 2005 U.S. Dist. LEXIS 5343, at *97-98 (emphasis added); and (4) such a holding would be "in at least some tension with *Cicippio-Puleo*," id. at 97; see also *Holland*, 2005 U.S. Dist. LEXIS 40254, at *41-44 (Kollar-Kotelly, J.) . . .

Today, this court reiterates its agreement with Judge Bates and Judge Kollar-Kotelly and again concludes that Congress did not intend to create a cause of action under the Flatow Amendment against foreign states through § 1606 of FSIA. As the D.C. Circuit has stated, "it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states." *Cicippio-Puleo*, 353 F.3d at 1036. In situations where "Congress has not expressly recognized" a cause of action against foreign states, courts should "decline to imply" one. *Id*. Accordingly, the court dismisses the *Vine* plaintiffs' claim against Iraq under the Flatow Amendment.

2. Federal Common Law

Additionally, Iraq argues that the three federal common law claims found in Counts I, VI, and VII must also be dismissed for

[16] The effect of section 1606 on the liability of foreign states under the Flatow Amendment was not explicitly addressed in *Cicippio-Puleo*.

failure to state a claim. The *Vine* plaintiffs disagree, contending that "it is plain that the complaint states a viable federal common law cause of action against Iraq" in light of the recent decision by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).

In *Pugh*, this court discussed at length, and rejected, the argument that federal common law provides a viable cause of action against a foreign sovereign under FSIA. *See Pugh*, 2006 U.S. Dist. LEXIS 58033, at *42-49. Specifically, this court noted that, in 2003, the D.C. Circuit "strongly signaled that a federal common law of tort is incompatible with section 1606 of FSIA . . . because section 1606 'instructs [courts] to find the law, not to make it.'" Id. at *45 (quoting *Bettis v. Islamic Republic of Iran*, 354 U.S. App. D.C. 244, 315 F.3d 325, 338 (D.C. Cir. 2003)). As such, the D.C. Circuit's holding "reflect[ed] the modern rule that the federal common law should only be employed in the rarest of circumstances." . . . Moreover, this court also rejected the argument that the *Pugh* plaintiffs' allegations fell "within the narrow category of cases that the Supreme Court has recently pronounced to be actionable" in *Sosa*, in large part because *Sosa* arose in the context of the Alien Tort Claims Act ("ATCA"), and not FSIA. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *47. That difference was "fatal" to the *Pugh* plaintiffs' argument. Id. Because FSIA, unlike the ATCA, details " 'precisely the sort of claims that a plaintiff may bring when suing under a waiver of immunity provided by the FSIA,'" id. . . . Because Congress had spoken on the particular matter at issue, by enacting section 1606 of FSIA, this court denied the plaintiffs' request to fashion a cause of action against Iraq under federal common law. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *48.

The logic in *Pugh* is equally applicable to this matter. Congress has addressed the claims that are available against a foreign country whose immunity has been waived, by enacting FSIA, and therefore this court may not resort to federal common law. Accordingly, plaintiffs' federal common law claims are dismissed.

3. State Common Law and Foreign Law Claims

In Counts III through IX, the *Vine* plaintiffs assert three state common law claims—false imprisonment, intentional infliction of

emotional distress, and loss of consortium—and four claims based on the law of Iraq and Kuwait. In the wake of the D.C. Circuit's opinion in *Cicippio-Puleo*, district courts in this jurisdiction have uniformly held that state or foreign law may be used to hold foreign states liable for acts of terrorism. . . .

Iraq contends that these cases are in error, suggesting that Congress preempted state and foreign law by enacting the Flatow Amendment. Def.'s Mot. (Civ. No. 01-2674) at 23-25. Iraq's argument is untenable, for as other courts in this jurisdiction have held, neither the text nor the legislative history of the Flatow Amendment supports the assertion that the Congress intended to "occupy the field" to the exclusion of state or foreign law. *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *50-53. Rather, "[f]ar from preempting state law in section 1605(a)(7) cases, the FSIA invites" the application of state and foreign law "through section 1606." Id. at *51 (emphasis in original). . . . Accordingly, the court denies Iraq's motion to dismiss the *Vine* plaintiffs' state common law and foreign law claims.

(4) Rights in immovable property: City of New York v. Permanent Mission of India

On April 26, 2006, the U.S. Court of Appeals for the Second Circuit affirmed on interlocutory appeal a lower court decision finding jurisdiction over claims by the City of New York against the Permanent Mission of India to the United Nations and the Permanent Representative of Mongolia to the United Nations for failure to pay local property taxes on certain properties owned by the respective governments. *City of New York v. Permanent Mission of India*, 446 F.3d 365 (2d Cir. 2006). The courts found jurisdiction pursuant to 28 U.S.C. § 1605(a)(4), which provides an exception to immunity under the FSIA where "rights in immovable property situated in the United States are in issue." As described by the court of appeals, India and Mongolia each own buildings in New York City that house their missions to the United Nations and are also used to house employees of the mission below the rank of Head of Mission or Minister Plenipotentiary. The Mongolian Ambassador

also resides in Mongolia's building. The court explained further:

> In accordance with its interpretation of this state law and applicable treaties, the City has been levying property taxes against the two properties in question for years, but has had no success in getting the missions to pay. By operation of New York law, these unpaid taxes eventually converted into tax liens held by the City against these two properties.

The court noted that "[w]hat is controverted here is what is meant by "rights in" immovable property" and concluded that

> the "immovable property" exception to foreign sovereign immunity should be construed to include any case where what is at issue is: (1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property. We think this interpretation is the most consistent with the broad, albeit vague, language of the provision itself, as well as with the FSIA's general principle of withdrawing sovereign immunity where states act in the same manner as private actors. In addition, it gives effect to the intent of the FSIA's drafters "to bring American sovereign immunity practice into line with that of other nations." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981).

In concluding that the district court was correct in determining that it had jurisdiction over the case, the court noted that "the merits of this dispute are not before us" and "express[ed] no opinion as to whether the City is correct that it may levy property taxes on those portions of embassy buildings that are used to house lower-level diplomatic employees [nor] as to what sorts of remedies will be available to the City should it prevail on its claim."

Following the Second Circuit decision, defendants filed a petition for writ of certiorari in the U.S. Supreme Court. In December 2006, at the invitation of the Court, the United States filed a brief as *amicus curiae* supporting the grant of the petition for writ of certiorari. The United States stated that, in its view, "the decision of the court of appeals is in error and the petition for a writ of certiorari should be granted, limited to the first question presented."* That question is:

> Whether a suit to recover unpaid property taxes imposed on property owned by a foreign sovereign and to declare the validity of a tax lien arising out of those unpaid taxes falls within the immovable property exception to the general rule of immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(4).

Permanent Mission of India to the United Nations v. City of New York, No. 06134. The full text of the U.S. brief, excerpted below, is available at *www.usdoj.gov/osg/briefs/2006/2pet/6invit/toc3index.html*. Most footnotes and references to other submissions have been deleted.

* * * *

A. THE COURT OF APPEALS' EXPANSIVE CONSTRUCTION OF SECTION 1605(a)(4) IS INCONSISTENT WITH ITS TEXT AND THE HISTORICAL PRACTICE THAT IT CODIFIED

1. Section 1605(a)(4) establishes a narrow exception to foreign state immunity for cases in which "rights in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). The requirement that "rights in" real property actually be "in issue" makes clear that rights

* The second question presented was "[w]hether the court of appeals erred in relying on two international agreements regarding foreign sovereign immunity to which the United States is not a party in the course of interpreting the FSIA." The U.S. brief noted that "the question whether and to what extent international agreements shed light on the proper construction of the FSIA's immovable property exception is subsumed within the first question presented."

of ownership, use, or possession of the property itself must be at stake for the exception to be implicated. *See Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) ("[T]he immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue."). Contrary to respondent's contention, the "taxability of the property" is not a "right in" the property in any ordinary meaning of that term. Nor is it reasonable to construe that phrase, as the court of appeals did, to connote all "obligations arising directly out of such rights to or use of the property," including "obligations imposed by the local government as part of its property law regime." Congress spoke of "rights," not "obligations," and specifically of rights "in" property, not broadly of obligations "arising directly out of" a foreign sovereign's relationship to the property. Because the court of appeals' interpretation is not supported by the statute's text, it should be rejected.

2. Even if the statutory phrase were ambiguous with regard to the question here presented, it must be understood by reference to "the pre-existing real property exception to sovereign immunity recognized by international practice" at the time the FSIA was enacted. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U. S. 1051 (1985); *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613 (1992) (FSIA's immunity exceptions should be construed in light of the understanding of "the restrictive theory at the time the statute was enacted").

Treatises on international law that pre-dated the FSIA emphasized the narrow nature of the real property exception. One commentator, for example, described the exception as permitting a foreign state to be sued to resolve "questions pertaining to title or the adverse interests of individual claimants." *Hyde, supra*, at 848. And the Restatement (Second) of Foreign Relations Law of the United States (Second Restatement) emphasized that the exception did not abrogate immunity "with respect to a claim arising out of a foreign state's ownership or possession of immovable property" that did "not contest[] such ownership or the right to possession." Second Restatement § 68 cmt.d at 207 (1965). See 6 Digest of International Law 638 (1968) (quoting the same); *Reclamantes*, 735 F.2d at 1522 (noting that the traditional real property exception

was "limited to disputes directly implicating property interests or rights to possession").

The real property exception pre-dates not only the FSIA, but also the restrictive theory of immunity, which is itself instructive regarding the narrowness of the exception's scope. The Tate Letter noted that "[t]here is agreement by proponents of both [the absolute and restrictive] theories * * * that sovereign immunity should not be claimed or granted in actions with respect to real property." See Tate Letter in *Alfred Dunhill*, 425 U.S. at 711. Thus, contrary to the court of appeals' understanding, the real property exception is not rooted in the restrictive theory of immunity, on the supposed premise that "ownership of real estate in a foreign country must be considered [a private act]" and therefore subjects a foreign sovereign to suit in the same way a private person would be. Rather, the real property exception traces its roots to the time of absolute immunity, and reflects that even those who rejected the notion that a foreign sovereign should be subject to suit for its private acts recognized a real property exception because of the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521. Thus, for example, a court is not barred from adjudicating a quiet title action with respect to a local property simply because one potential claimant is a foreign sovereign. In contrast, efforts by one sovereign to collect property taxes from another sovereign is by no account the kind of "primeval interest" concerning real property itself that would have been recognized during the period of so-called "absolute" immunity from the courts' jurisdiction.

The court of appeals cited two pre-FSIA decisions in support of its conclusion that courts in the United States possessed jurisdiction over claims concerning taxes levied against a foreign sovereign's real property. . . . *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969), and *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971)). Neither of those cases, however, involved the exercise of jurisdiction over a claim brought against a foreign sovereign or its property, and thus neither presented a question of immunity. In *Republic of Argentina*, the foreign state affirmatively invoked the jurisdiction of the court to seek

the return of municipal taxes that had already been paid and a declaration that no further taxes were owed. 25 N.Y. 2d at 257. Argentina thus waived any immunity from the court's exercise of jurisdiction to render a declaration regarding the taxes' validity (which the court did, in favor of Argentina). In *Glen Cove*, no foreign state was even a party to the litigation. Rather, the United States sued (successfully) to enjoin the assessment of taxes against a diplomatic residence of the Soviet Union and to have tax liens against the property discharged. 322 F. Supp. at 150, 155.

Respondent acknowledges that, "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute." Respondent maintains, however, that that fact "is of no significance, because it is also true that no court during that period declined to exercise such jurisdiction." That is not so. For example, in *City of New Rochelle v. Republic of Ghana*, 255 N.Y.S. 2d 178 (County Ct. 1964), the court dismissed, on the basis of the State Department's suggestion of immunity, the municipality's suit to foreclose on tax liens on real property owned by several foreign countries for the purpose of housing their principal representatives to the United Nations. *Id*. at 179. See also *Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] 2 D.L.R. 481, 500 (recognizing that "Courts * * * are without jurisdiction" to determine a tax against a foreign sovereign's land).

In any event, contrary to respondent's suggestion, the dearth of pre-FSIA cases addressing foreign states' immunity from suit regarding tax liabilities on real property is not neutral as to the parties' respective positions. Rather, it reflects the widespread understanding that foreign sovereigns and their property enjoyed immunity from such suits. It has always been the general rule in the United States that foreign sovereigns are immune from the courts' jurisdiction, subject to specific exemptions. Respondent's inability to cite pre-FSIA examples of courts exercising jurisdiction over property tax claims is strong evidence that no exception to the general rule of immunity existed as to such claims. In fact, one reason given by those commentators who argued that foreign sovereigns should be exempt from property taxes in the first place was "the impossibility of collecting any taxes, since foreign states and

their property are not subject to suit or judicial process." William W. Bishop, Jr., Immunity from Taxation of Foreign State-Owned Property, 46 Am. J. Int'l L. 239, 256 (1952)). See *id.* at 242 (quoting V Op. Att'y Gen. Mass. 445 (1920) ("[E]ven in the event that a tax [on personal property] were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax.").

3. International agreements also support the conclusion that the immovable property exception does not abrogate immunity for the broad range of claims indicated by the court of appeals. The Vienna Convention on Diplomatic Relations (Vienna Convention), to which the United States is a party, 23 U.S.T. 3227 (1972), contains, in Article 31, an analogous exception to the immunity of diplomatic agents for "a real action relating to private immovable property situated in the territory of the receiving State, unless [the agent] holds it on behalf of the sending State for the purposes of the mission." *Id.* at 3240 (emphasis added). The term "a real action" excludes "actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property." Eileen Denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations 238 (2d ed. 1998). Notably, the House Report on the FSIA specifically refers to the Vienna Convention in its discussion of the immovable property exception to immunity in Section 1605(a)(4) and reflects Congress's understanding that the FSIA was consistent with it. See H.R. Rep. 1487, at 20.4

The court of appeals looked to and misinterpreted the European Convention and the U.N. Convention as supporting a broader construction of the FSIA's immovable property exception that encompasses suits regarding "obligations arising directly out of [a foreign state's] rights to or use of [immovable] property." Article 9 of the European Convention abrogates immunity for suits involving not only a foreign state's "rights or interests in, or its use or possession of, immovable property," but also its "obligations arising out of its rights or interests in, or use or possession of, immovable property."

11 I.L.M. at 473. And Article 13 of the U.N. Convention similarly provides an exception to immunity in cases involving not only "any right or interest of the State in, or possession of," immovable property, but also "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I. L.M. at 808. The court of appeals found it inconsequential that Congress did not enact in the FSIA language such as that used in the latter portion of the exception in those conventions. The court viewed the language of Section 1605(a)(4) as sufficiently "broad" that it did not "preclude[] its interpretation as synonymous to the European Convention." As petitioner points out (Pet. 12), how ever, Section 1605(a)(4) creates an exception to a foreign state's immunity only for cases in which "rights in" immovable property are themselves "in issue," not cases involving "obligations arising out of" the foreign state's rights or interests in or possession of such property.

Moreover, even the European and U.N. Conventions in fact do not abrogate immunity in a case such as this. The court of appeals overlooked the fact that Article 29 of the European Convention explicitly excludes proceedings concerning "customs duties, taxes or penalties" from its coverage. 11 I.L.M. at 481. Such claims involving public law disputes between states are outside the scope of the Convention, which "is essentially concerned with 'private law' disputes between individuals and States." Council of Europe, European Convention on State Immunity: Explanatory Report ¶ 113 (visited Dec. 20, 2006) <http://conventions.coe.int/ treaty/en/ Reports/HTML/074.htm>. The drafting history of the U.N. Convention similarly makes clear that Article 13 was not understood to permit suits to recover taxes or to impose tax liens on foreign state-owned property. In the early stages of drafting, the International Law Commission included both an immovable property exception (mirroring that ultimately adopted as Article 13) and also a separate provision waiving immunity for suits to collect taxes on real property used for commercial purposes. See Sixth Report on Jurisdictional Immunities of States and Their Property, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, at 21-25, Art. 17, U.N. Doc. A/CH.4/376 (1984) (Art. 17), at <http://untreaty.un.org/ ilc/documentation/english/a_cn4_376. pdf>. The tax exception

was subsequently deleted, with the explanation that it implicated state-to-state relations rather than the types of dispute between states and private persons that the Convention was intended to address. See Yearbook of the International Law Commission 1991, Vol. 1 (Summary Records of Meetings of 43rd Sess., Apr. 29-Jul. 19, 1991), at 84 (¶ 6). The clear implication is therefore that the drafters of the U.N. Convention did not understand property tax claims to fall within that Convention's immovable property exception.

Thus, contrary to the court of appeals' belief that it was construing the FSIA's language "as synonymous to the European Convention's version," and furthering "conformity" in practice among nations, the court has in fact introduced a significant and unwarranted inconsistency in international practice. The conventions reflect the understanding of their drafters that, even in the era of the restrictive theory, the longstanding exception to immunity for suits involving rights in immovable property does not subject a foreign sovereign to suit on a state-to-state dispute over whether property is subject to taxation.[6]

4. As an alternative basis to defend the court of appeals' judgment, respondent contends that its asserted tax lien is a "right in immovable property," which serves as a basis for the court's jurisdiction. As respondent acknowledges, however, the court of appeals specifically disavowed any reliance on "[t]he fact that [petitioners'] alleged obligations have converted into tax liens." Respondent's alternative theory suffers from at least two defects. First, a lien to secure a debt is not a "right in immovable property" to which Section 1605(a)(4) applies. Second, allowing respondent's

[6] The court of appeals also erred in relying on appropriations legislation enacted by Congress in 2004 and 2005 in construing the FSIA's immovable property exception. Those enactments provide for the deduction from foreign aid to a country of an amount "equal to 110 percent of the * * * unpaid property taxes owed by the central government of such country" to New York City or the District of Columbia, as determined "in a court order or judgment entered against such country by a court of the United States." Pub. L. No. 109-102, § 543(a) and (f)(4), 119 Stat. 2214-2215; Pub. L. No. 108-447, § 543(a) and (f)(4), 118 Stat. 3011-3012.

10-Cummins-Chap10.indd 600 10/22/07 11:43:10 PM

purported lien to serve as the basis for exercising jurisdiction would violate the FSIA's prohibitions against pre-judgment attachments and *in rem* jurisdiction.

a. Section 1605(a)(4) abrogates immunity only with respect to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). A tax lien is not a "right in" real property, but merely provides security for payment of a money debt. *See Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (liens are "merely a means to the end of satisfying a claim for the recovery of money," providing a compensatory remedy rather than specific relief);. . . .

In any event, the quoted language in the legislative history does not encompass an action to establish the validity of a lien. The common law did not even recognize a lien on land. 5 Herbert Thorndike Tiffany, The Law of Real Property § 1559, at 650 (3d ed. 1939). It also distinguished clearly between a lien and a servitude (or "*servient tenement*"), the latter constituting a direct interference with the ownership, possession, or use of one's land. See 3 Tiffany, *supra*, §§ 756, 758, at 200-201, 203-204; see also 5 First Restatement § 450 & cmt. a, § 455, at 2901-2903, 2919. A lien is different from rights in land such as covenants, easements and servitudes in important respects. For example, an order to sell property in bankruptcy free and clear of all liens, claims, encumbrances and rights "does not indicate that the property is to be sold free and clear of non-monetary restrictions of record which run with the land," such as servitudes. *In re Oyster Bay Cove, Ltd. Bankr.*, 161 B.R. 338, 343 (E.D.N.Y. 1994). A lien holder's primary claim is to the payment of debt, whereas a person suing for title, possession, or enforcement of a servitude seeks an immediate interest in the property itself. Especially in light of the historical origins of the immovable property exception, a lien is not a "similar matter" to issues of ownership, servitudes on the land, and even rents. It is one thing to ensure that foreign sovereign immunity does not prevent adjudication of title and covenants in real property—matters at the heart of the sovereign's primeval interest in real property within the realm—and quite another to expand the exception to cover debt collection efforts that attempt to use the property as a security.

b. The second defect in respondent's tax lien theory was identified by the court of appeals, namely that it is contrary to the FSIA's prohibition against using pre-judgment attachment to establish jurisdiction. See 28 U.S.C. 1609-1610; 28 U.S.C. 1610(d)(2) (permitting pre-judgment attachment only by waiver or "to secure satisfaction of a judgment * * * and not to obtain jurisdiction"); H.R. Rep. 1487, at 26-27 (FSIA was intended to end the practice of permitting "an attachment for the purpose of obtaining jurisdiction over a foreign state or its property"). Indeed, the FSIA significantly limits the measures of restraint against sovereign property that a court can impose even in the event of a judgment. See 28 U.S.C. 1610(a)(4)(B); 28 U.S.C. 1610(a). Given such restrictions on the court's ability to impose measures in aid of execution, it is inconceivable that respondent could, through the mere statutory declaration of a lien or other self-help measures, create jurisdiction in the court.

B. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

1. The court of appeals' decision creates an acknowledged circuit conflict with respect to the meaning of Section 1605(a)(4). The Second Circuit recognized that its decision is contrary to the Third Circuit's in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). And although the court of appeals did not acknowledge the point, its interpretation of Section 1605(a)(4) is also contrary to that of the District of Columbia and First Circuits.

* * * *

Moreover, the issue on which the courts of appeals are divided is important to our Nation's foreign relations. The Second Circuit is the home of the United Nations Headquarters and most missions to that international body. As the Department of State explained in its submission to the court of appeals, the exercise by courts in the United States of jurisdiction over claims for unpaid property taxes and for tax liens on foreign state property is likely to give rise to complaints "that the United States is failing to live up to its obligation to protect [the U.N. diplomatic community]

against infringements of sovereign immunity" and may provoke referral of the matter to the International Court of Justice by the United Nations. Gov't C.A. There is also a danger that foreign governments will retaliate, by placing liens on United States-owned real property abroad, or otherwise hindering the ability of the United States' missions abroad to buy, sell and construct diplomatic properties. One foreign state defendant has already responded to the assertion of jurisdiction over it by blocking the United States Government's sale of a major piece of property in that country.

Because of the circuit conflict and the importance of the immunity issue, review by this Court is warranted. There is no need, however, for the Court to grant independent review on the second question presented in the petition (Pet. i)-whether the court of appeals erred in considering the European Convention and the United Nations Convention in the course of determining the scope of foreign sovereign immunity conferred by the FSIA. The question whether and to what extent those international agreements shed light on the proper construction of the FSIA's immovable property exception is subsumed within the first question presented.

c. Contempt sanctions: Af-Cap v. Congo

In *Af-Cap v. Congo*, 462 F.3d 417 (5th Cir. 2006), discussed in a.(3) *supra*, the U.S. Court of Appeals for the Fifth Circuit held that the district court had abused its discretion in issuing a contempt order against the Republic of Congo because the FSIA barred issuance of such an order, as excerpted below.

---

* * * *

The district court entered the contempt order on July 1, 2005 after the Congo alerted the court that it would not comply with the turnover order. The court ordered the Congo to pay $10,000 per day into the registry of the district court until it complied with the turnover order. It further stated that if the Congo continued to ignore the turnover order for sixty days, the Congo would be required to send written notice to its business associates in the

United States informing them of the amount of outstanding judgment in the case and of the Congo's contempt of court.[8]

1. The FSIA Bars the Contempt Order

The FSIA creates the sole method for obtaining jurisdiction over a sovereign state. *Republic of Austria v. Altmann*, 541 U.S. 677, 691, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). It also provides the sole, comprehensive scheme for enforcing judgments against foreign sovereigns in civil litigation. 28 U.S.C. § 1609. The legislative history surrounding the FSIA specifically discusses contempt orders and states that they "may be unenforceable if immunity exists." H.R.Rep. No. 94-1487, at 22 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6621.

The contempt order, as written, does not fall within the provisions of the FSIA. A review of the relevant sections, § 1610 and § 1611, shows that they do not present a situation in which the order could stand. Those sections describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included. Therefore, in issuing the contempt order, the district court relied on an erroneous conclusion of law. As such, the court abused its discretion, and the contempt order is vacated.

2. The FSIA Allows Rights Without Remedies

Because we base our holding on the FSIA, we need not reach other issues raised by the parties.[9] We note, however, an error in the district court's reasoning so that future courts will not repeat it. In granting the contempt order, the district court reasoned that Congress must have intended to authorize money sanctions against foreign states when it authorized the issuance of injunctive relief against them. That reasoning is flawed. Under the FSIA, a court's

[8] The United States, as amicus curiae, argues that the district court erred in imposing contempt sanctions against the Congo. In foreign sovereignty cases, such as this one, the government's view is entitled to deference. *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945). . . .

[9] The government argues that equitable principles and international practice also require vacating the order.

power to make an order does not always entail a power of enforcement by sanctions. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir.1984) (rejecting the argument that Congress could not have intended in the FSIA to "create a right without a remedy").

* * * *

As noted in the Fifth Circuit opinion, the U.S. brief as *amicus curiae* argued also that "the sanctions contravene international practice and could adversely affect our nation's relations with foreign states as well as open the door to sanctions against the United States abroad." The court found it unnecessary to address this argument. Excerpts follow from the U.S. brief on this point; the full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

B. Monetary Contempt Sanctions Against A Foreign State Contravene Equitable Principles And International Practice, And Could Have Significant Adverse Foreign Policy Consequences.

Regardless whether a U.S. court has the power to order monetary sanctions . . . against a foreign state—a question that this Court need not decide—basic principles of equity and comity should preclude such an order.

1. As we have explained, monetary contempt sanctions against a foreign state cannot be enforced because no statutory exception to immunity from execution of those sanctions applies. "A court should not issue an unenforceable injunction" against a foreign state. *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 545, 548 (9th Cir. 1996). In exercising its equitable authority, a court should be cautious that its orders will be effective and that they will utilize the least amount of force necessary to achieve the desired end. *See, e.g., Shillitani v.United States*, 384 U.S. 364, 371 (1966); *cf. Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 550 (1937) ("[A] court of equity may refuse to give any relief when

it is apparent that that which it can give will not be effective or of benefit to the plaintiff.").

The United States Government does not condone a foreign state's failure to comply with the order of a U.S. court. But compliance must be sought by other means. A district court may direct an adverse evidentiary presumption against a recalcitrant foreign state or, if the claimant can "establish[] his claim or right to relief by evidence satisfactory to the court," may even enter a default judgment against the state. 28 U.S.C. § 1608(e). An aggrieved litigant may also pursue non-judicial remedies, including diplomatic intercession. As an equitable matter, however, a U.S. court should not enter an order of monetary sanctions against a foreign state that is immune from execution of any such order.

2. Foreign policy considerations and international law and practice also weigh strongly against imposing monetary contempt sanctions in response to a foreign state's failure to comply with a court's injunctive order.

In considering the appropriate response to a foreign state's failure to comply with an injunction, it is important to recognize the strongly held view of many foreign states that they are not subject to coercive orders by a U.S. court. Absent specific evidence to the contrary, the refusal of a sovereign state to conform to a judicial directive should not be considered as an expression of scorn or contempt for which such sanctions are normally imposed. Rather, such a refusal may reflect a determination by that foreign state that a U.S. court lacks power to control its conduct. Foreign nations that have statutes governing sovereign immunity do not permit a court to enter an injunction against a foreign state, and the foreign state may expect the United States to extend to it the same respect and courtesy.[3] The potential for affront may be particularly acute

[3] Although there is widespread acceptance in modern international law that foreign states' immunity from adjudication may be restricted, "immunity from enforcement jurisdiction remains largely absolute," and "a foreign State continues largely immune from forcible measures of execution against its person or property." H. Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States," in M. Evans, ed., International Law 364, 366, 371 (2003); *see also id.* at 371 ("Nor may an injunction or order for specific performance be directed by a national court against a foreign State on pain of penalty if not obeyed.").

where the district court issues an injunctive order, such as the turnover order in this case, that purports to control the foreign state's conduct within its own borders. *Cf.* Record Excerpt 8, *Republic of Congo v. Af-Cap Inc.*, No. 05-50782 (5th Cir.) (Mar. 3, 2005, letter from Congolese Minister of Foreign Affairs and Francophony) (stating that U.S. litigation "is premised on the erroneous notion that an American court may transfer the rights of a sovereign nation—the Republic of Congo—to dispose of its resources within its borders," and the court's erroneous assertion of authority to "supersede the Congo's sovereign authority to prescribe and enforce its own laws within its own territory").

Furthermore, general principles of foreign and international law shed light on the proper treatment of foreign sovereigns in U.S. courts. *See Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999). Where U.S. practice diverges from international practice, other governments may react by subjecting the United States to similar enforcement mechanisms when our Government litigates abroad. Under the laws and practices of other nations, monetary sanctions may not be imposed on a foreign state even if the state violates a court order.

Thus, for example, the European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state for refusal "to comply with a court order to produce evidence (contempt of court)." (fn. omitted) Under the Convention, a court faced with a foreign state's noncompliance is limited to remedies involving "whatever discretion [the court] may have under its own law to draw the appropriate conclusions from a State's failure or refusal to comply." European Convention on State Immunity, (E.T.S. No. 074), Explanatory Report, Point 70 (discussing Article 18) (convention entered into force June 11, 1976).[5]

In a similar vein, the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted in 2004, provides that "[a]ny failure or refusal by a State to comply

[5] Because the European Convention does not provide for any mechanism to enforce a judgment against a foreign state, *a fortiori* courts lack power under the Convention to enter coercive sanctions for non-compliance with their judgments.

with an order of a court of another State enjoining it to perform or refrain from performing a specific act * * * shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal." United Nations Convention on Jurisdictional Immunities of States and Their Properties, Article 24(1).

The United Nations Convention is not yet in force, and the United States is not a signatory to the Convention. Nevertheless, a number of its provisions, including Article 24(1), generally reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion. In the early 1986 formulation of the draft Articles, the International Law Commission proposed two provisions barring courts from imposing coercive measures on foreign states, one of which recognized a state's immunity "from any [judicial] measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty." Yearbook of the International Law Commission, 1986, Vol. II, Part Two, pp. 12, UN Doc. A/41/10, chap. II.D. Some states considered that formulation too narrow, with Mexico complaining that coercive measures "do not consist solely in monetary penalties," and the United Kingdom protesting that the Articles should recognize state "immunity from the very possibility of having such an order made against it." *International Law Commission: Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, UN Doc. A/CN.4/410, at 33 (Feb. 17, 1988). As the United Kingdom elaborated, it is not "appropriate for a domestic court to order the Government of another State, without its consent, to do or not to do particular acts whether or not any penalty is threatened," and "[i]n any event, there is in general no method of enforcing such a penalty against a foreign State * * *." *Id.*, UN Doc. A/CN.4/410, at 58; *see also id.* at 24 (comments of German Democratic Republic) ("[I]t is not permissible as a matter of principle to exercise judicial compulsion against another State."). As noted above, the final Convention

directed that states would be immune from fines or penalties for failure to comply with an injunctive order, and that the only permissible consequences would be "those which may result from such conduct in relation to the merits of the case." United Nations Convention on Jurisdictional Immunities of States and Their Properties, Article 24(1).

Finally, individual nations other than the United States that have codified foreign sovereign immunity law, although relatively few in number, uniformly have protected foreign states from monetary sanctions for failure to comply with an injunctive order. Canadian law provides, for example, that "[n]o penalty or fine may be imposed by a court against a foreign state" for its failure to produce documents or other information to the court, and further provides that a state shall be immune *in toto* from any "injunction, specific performance or the recovery of land or other property." Canadian State Immunity Act, §§ 12(1), 10(1). The United Kingdom State Immunity Act similarly provides that a foreign state may not be penalized with monetary sanctions for its failure to disclose or produce any document or other information in court proceedings, and also may not be subject to any "injunction or order for specific performance," absent narrow circumstances not present here. UK State Immunity Act, § 13.

Singapore and Pakistan have also enacted immunity provisions essentially identical to those of Canada and the United Kingdom. *See* Singapore State Immunity Act, § 15; Pakistan State Immunity Ordinance, § 14. And Australian law provides that "[a] penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court." Australian Foreign States Immunities Act of 1985, § 34. In sum, the international practice is to bar monetary contempt sanctions of the type ordered by the district court.

3. There is virtually no precedent in U.S. law for the district court's contempt orders. Although a small number of U.S. courts have ordered monetary contempt sanctions against an *agency or instrumentality* of a foreign state, those courts have done so without considering whether the FSIA permits the enforcement of such sanctions. *See, e.g., First City, N.A. v. Rafidain Bank*, 281F.3d 48,

52-55 (2d Cir.) (affirming sanctions order for failure to comply with post-judgment discovery order, but addressing only question whether court had authority to order discovery), *cert. denied*, 537 U.S. 813 (2002); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477-1478 (9th Cir.) (upholding monetary contempt sanctions for failure to comply with post-judgment discovery order, but limiting analysis to whether FSIA permitted requirement of supersedeas bond or letter of credit pending appeal), *cert. dismissed*, 506 U.S. 948 (1992).

The one district court to consider the enforceability of coercive monetary sanctions against a foreign state agency or instrumentality has recognized that such sanctions likely would not be enforceable. *United States v. Crawford Enters., Inc.*, 643 F. Supp. 370, 381-382 (S.D. Tex. 1986), *aff'd*, 826 F.2d 392 (5th Cir. 1987). Sanctions against a foreign state agency or instrumentality are distinguishable, in any event, because the potential affront to the dignity and sovereignty of the foreign state are considerably lessened where the order is not against the state itself, as is the likelihood of conflict with United States foreign policy interests.

To our knowledge, *no* court of appeals has ever considered whether a monetary contempt order may be enforced against a foreign state under the FSIA attachment provisions. *Cf. Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79-80 (3d Cir. 1994) (vacating injunctive order against foreign state but suggesting in *dictum* that court could impose monetary sanctions for contumacious conduct). Only one other district court of which we are aware has entered such an order, but that order has not yet become final, and a motion to vacate the order is currently pending before the district court that entered it. *See Belize Telecom Ltd. v. Government of Belize*, No. 05-CV-20470 (S.D. Fla.). It is the position of the United States, as set forth in a proposed amicus brief in the appeal of that ruling (an appeal that was subsequently dismissed for lack of appellate jurisdiction), that the district court erred and abused its discretion in *Belize Telecom* in ordering monetary contempt sanctions against the Government of Belize.

The conclusion that monetary contempt sanctions should not be imposed against foreign states gains support from the analogous context of courts' treatment of the United States Government.

The United States Government is immune from the jurisdiction of U.S. courts except to the extent that its immunity has been abrogated by Congress. Numerous courts have recognized that, even where Congress has waived the United States's immunity to suit, the Government may not be ordered to pay monetary sanctions for violation of a court order absent an explicit waiver of sovereign immunity for such sanctions. *See, e.g., Yancheng Baolong Biochem. Prods. Co. v. United States*, 406 F.3d 1377, 1382-1383 (Fed. Cir. 2005); *Coleman v. Espy*, 986 F.2d 1184, 1190-1192 (8th Cir.), *cert. denied*, 510 U.S. 913 (1993); *see also In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998) (holding that sovereign immunity would prevent a litigant from seeking monetary damages or attorneys' fees and costs from contumacious federal official). The basic premise of foreign sovereign immunity is that other nations are the juridical equals of the United States. *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (noting theory of "perfect equality and absolute independence of sovereigns"). Accordingly, decisions regarding the treatment of the United States Government may properly inform the treatment of foreign Governments in our courts.

Finally, in determining the propriety of an order of contempt sanctions, it is significant that, even if the order is unenforceable, it would likely be viewed by the foreign state as a suggestion of purposeful wrongdoing, and could offend the dignity of the foreign State. *Cf. In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (noting that contempt order against high-level Greek officials "offends diplomatic niceties even if it is ultimately set aside on appeal"). Were a foreign court to assert the same power over the United States Government that the district court has asserted in this litigation over the Republic of Congo, ordering the United States Government to turn over assets within this country to a foreign plaintiff in direct contravention of our nation's foreign policy, it would undoubtedly lead to great public outcry. In interpreting and applying the FSIA, it is vital to "consider[] the potential impact of our FSIA interpretations on foreign litigation involving the United States and its interests." *Aquamar, S.A.*, 179 F.3d at 1295.

* * * *

d. Collection of judgments

(1) Attachment of property belonging to a foreign state: Ministry of Defense v. Elahi

On February 21, 2006, the U.S. Supreme Court vacated a decision of the Ninth Circuit Court of Appeals and remanded for further proceedings consistent with its opinion. *Ministry of Defense v. Elahi*, 546 U.S. 450 (2006). In its opinion, the Supreme Court agreed with the United States that the Ninth Circuit had failed to address the distinction in the FSIA between immunity to attachment against property belonging to a foreign state and immunity to attachment of property belonging to an agent or instrumentality of a foreign state, and that this "critical legal point" was not addressed in the briefs of the parties. The U.S. brief as *amicus curiae* filed with the Supreme Court is excerpted in *Digest 2005* at 549-55, and available in full at *www.usdoj.gov/osg/briefs/2005/2pet/6invit/toc3index.html; see also Digest 2004* at 516-17. Excerpts below from the Supreme Court's *per curiam* decision describe the case and the basis for its remand.

A private citizen seeks to attach an asset belonging to Iran's Ministry of Defense in order to help satisfy a judgment for money damages. The question raised is whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1602 *et seq*. (2000 ed. and Supp. III), forbids that attachment.

The judgment for money damages consists of a default judgment against the Islamic Republic of Iran (for about $300 million) that the private citizen, Dariush Elahi, obtained in a federal-court lawsuit claiming that the Republic had murdered his brother. *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 103 (DC 2000). The asset is an arbitration award (against a third party), which Iran's Ministry of Defense obtained in Switzerland. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1211 (CA9 2004). The Ministry asked the Federal District Court for the Southern District

of California to confirm the award. *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 236 F. Supp. 2d 1140 (2002). The court did so. And Elahi then intervened, seeking to impose a lien upon the award. The Ministry opposed the attachment on the ground that the Act grants it immunity from such a claim.

The Federal District Court rejected the Ministry's immunity defense on the ground that, by suing to enforce the award, the Ministry had waived any such immunity. On appeal the Ninth Circuit disagreed with the District Court about waiver. But it then found against the Ministry on a different ground—a ground that the parties had not argued. The Act says that under certain conditions the property of an "*agency or instrumentality*" of a foreign government is "*not . . . immune from attachment*" if the agency is "engaged in commercial activity in the United States." 28 U.S.C. § 1610(b) (emphasis added). The Court of Appeals found that the Ministry engages in commercial activity and that the other conditions were satisfied. 385 F.3d at 1219-1222 (applying § 1610(b)(2)). And it held that this section of the Act barred the Ministry's assertion of immunity. *Ibid.*

The Ministry filed a petition for certiorari asking us to review that decision. The Solicitor General agrees with the Ministry that we should grant the writ but limited to the Ministry's Question 1, namely whether "the property of a foreign state *stricto sensu*, situated in the United States" is immune from attachment . . . as provided in the Foreign Sovereign Immunities." Pet. For Cert. I (citing §§ 1603(a), 1610(a)). The Solicitor General also asks us to vacate the judgment of the Court of Appeals and remand the case for consideration of whether the Ministry is simply a "*foreign state*" (what the Ministry calls "a foreign state *stricto sensu*") or whether the Ministry is an "agency or instrumentality" of a foreign state (as the Ninth Circuit held). . . . We grant the writ limited to Question 1.

The Act, as it applies to the "property in the United States of a *foreign state*," § 1610(a) (emphasis added), does *not* contain the "engaged in commercial activity" exception that the Ninth Circuit described. That exception applies only where the property at issue is property of an "*agency or instrumentality*" of a foreign state. . . . The difference is critical. Moreover, in the Solicitor General's view

a defense ministry (unlike, say, a government-owned commercial enterprise) generally is not an "agency or instrumentality" of a foreign state but an inseparable part of the state itself. . . .

* * * *

. . . [I]n implicitly concluding that the Ministry was an "agency or instrumentality" of the Republic of Iran within the meaning of § 1610(b), the Ninth Circuit either mistakenly relied on a concession by respondent that could not possibly bind petitioner, or else erroneously presumed that there was no relevant distinction between a foreign state and its agencies or instrumentalities for purposes of that subsection. See § 1603(a),(b). Either way, the Ninth Circuit committed error that was essential to its judgment in favor of respondent.

Because the Ninth Circuit did not consider, and the Ministry had no reasonable opportunity to argue, the critical legal point we have mentioned, we vacate the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with this opinion.

On remand to the Ninth Circuit, the United States filed a brief as *amicus curiae* supporting reversal of the court of appeals decision. The United States explained that it filed the *amicus* brief "to further two vital public interests":

> First, while the United States strongly encourages foreign states to satisfy judgments properly obtained under the FSIA, foreign sovereigns are entitled to receive the full protections afforded by that statute. The FSIA embodies principles of customary international law regarding foreign states' sovereign immunities. Accordingly, subjecting a foreign state to suit or execution in a manner inconsistent with the FSIA would provoke significant diplomatic objection. Moreover, core components of the United States Government are often sued abroad. If the central organs of foreign states receive only the lesser immunities afforded to agencies or instrumentalities, there is a significant risk that our own Departments will receive reciprocal unfavorable treatment in foreign litigation. For these reasons, the United States has appeared

in litigation such as this to ensure the proper application of foreign sovereign immunity principles. . . .

Second, the United States has a significant interest in ensuring the proper application of the Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act). Under that statute, certain judgment-creditors of Iran may elect to receive compensation in an amount up to the total of their judgments against Iran. The Victims Protection Act requires judgment-creditors to relinquish certain rights to attach Iranian property, in exchange for choosing to accept payment under the act. The United States has an interest in ensuring that individuals who accept payment do not thereafter seek to exercise the attachment rights they relinquished, both because this is inequitable to other payees, and because, in cases such as this one, the United States may be liable to Iran for any amounts attached. See, e.g., *Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005).

The U.S. brief first discussed the relevance of the Victims Protection Act to this case. The full text of the U.S. brief, with attachments (including the declaration of Mina Almassi referred to below), is available at *www.state.gov/s/l/c8183.htm* (footnotes and citations to other submissions have been deleted from excerpts set forth in this section).

---

* * * *

I. By Accepting Compensation under the Victims Protection Act, Elahi Has Relinquished any Right to Attach the Cubic Judgment.

Iran obtained a $2.8 million international arbitration award against Cubic Defense System in a dispute over a contract for military equipment. *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 385 F.3d 1206, 1210 (9th Cir. 2004). It reduced that award to judgment in the District Court for the Southern District of California.

Ibid. Elahi claims a right to attach the Cubic judgment under Section 1610(a) of the FSIA and under [the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2,322] Section 201(a). Elahi Supp. Br. 13–20. But neither provision authorizes Elahi's attachment, as he has relinquished "all rights" to attach the Cubic judgment.

In its prior opinion in this case, this Court held that Stephen Flatow, another judgment-creditor of Iran, had relinquished any right to attach the Cubic judgment because he elected to receive payment under the Victim Protection Act. *Ministry of Defense*, 385 F.3d at 1213–1217. Elahi acknowledges that he, too, elected to receive compensation under the [Victims of Trafficking and Violence Protection Act of 2000 ("Victims Protection Act"), Pub. L. No. 106-386, 114 Stat. 1,464]. Although Elahi accepted compensation under a different provision than Flatow, the same general principle applies: By electing to receive payment under the Victim Protection Act, Elahi has relinquished any right to attach certain property, including the Cubic judgment at issue here.

Flatow chose to receive payment equal to 100 percent of his compensatory judgment against Iran. *Ministry of Defense*, 385 F.3d at 1213. Under the applicable statutory provision, a person electing to recover 100 percent of a compensatory judgment relinquishes the right to attach property that is at issue in claims against the United States before an international tribunal or subject to 28 U.S.C. § 1610(f)(1)(A). Victims Protection Act § 2002(a)(2)(D). This Court concluded that the Cubic judgment is subject to Section 1610(f)(1)(A). *Ministry of Defense*, 385 F.3d at 1217. Accordingly, it held that, by receiving compensation, Flatow had relinquished any right to attach the Cubic judgment. *Ibid*.

Elahi received pro rata compensation under the provision of the Victims Protection Act that was amended by TRIA Section 201(c). That amendment also contains a relinquishment provision. Receipt of any amount of compensation effects a relinquishment of "all rights" to execute against or attach property that is at issue in a claim against the United States before an international tribunal. Victims Protection Act § 2002(a)(2)(D), (d)(5)(B) (as amended by TRIA § 201(c)(4)).

10-Cummins-Chap10.indd 616 10/22/07 11:43:12 PM

Treasury Department regulations implementing this amendment to the Victims Protection Act explain that anyone receiving payment under the amended provisions "shall be required to relinquish rights * * * with respect to enforcement against property that is at issue in claims against the United States before an international tribunal." 68 Fed. Reg. at 8080. The regulations require a person receiving a pro rata payment to sign a declaration stating that "I hereby relinquish * * * all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal." *Id*. at 8081. The declaration further states that "I understand that the relinquishment that I make in the event of any pro rata distribution is irrevocable once the payment is credited to the bank account I have identified in this application." *Ibid*. Elahi acknowledges that he received compensation "pursuant to" these regulations. Thus, by accepting payment under the amended provisions of the Victims Protection Act, Elahi relinquished any right to attach the Cubic judgment, if that judgment is "at issue" in a claim against the United States before an international tribunal.

The Cubic judgment is "at issue" in a claim against the United States in the Iran-U.S. Claims Tribunal, an international tribunal established at the Hague under the Algiers Accords, which resolved the Iranian hostage crisis in 1981. *See Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1003 n.1, 1008 (7th Cir. 2004). As several courts of appeals have already concluded, the Claims Tribunal is an "international tribunal" for purposes of the Victims Protection Act relinquishment provision. . . .

The record here establishes that the Cubic judgment is at issue before the Claims Tribunal. In the district court, the Ministry of Defense filed "Statement No. 16," an Iranian pleading previously filed in Case No. B/61, which is pending before the Iran-U.S. Claims Tribunal. *See* Decl. of Mina Almassi, Case No. 98-1165, Docket No. 85, ¶ 7 & Ex. 2 (filed Sept. 13, 2002). That pleading specifically notes that the Ministry of Defense obtained an arbitration award against Cubic of $2,808,519, and acknowledges that Iran will subtract any amount it recovers from Cubic in its claim against the United States in the Iran-U.S. Claims Tribunal. The pleading states: "This amount, if received, will be recuperated

from the remedy sought" against the United States. Almassi Decl., Ex. 2, at 3 n.2. In an attempt to collect on the arbitration award, the Ministry reduced the award to judgment in the district court. Because the United States' potential liability to Iran in Case No. B/61 will be affected by Iran's ability to collect on the Cubic judgment, that judgment is "at issue" before the U.S.-Iran Claims Tribunal.

* * * *

. . . Both the arbitration action and Case No. B/61 concern Cubic's contract with Iran for military equipment. The arbitration action concerned Cubic's liability for non-delivery, and Case No. B/61 will determine the amount of United State's liability, if any. The district court failed to consider Iran's representation that it would subtract from any liability the United States might have the amount of any recovery it obtains from Cubic. *See* Almassi Decl., Ex. 2, at 3 n.2. Because the United States' liability in Case No. B/61 is directly affected by Iran's ability to collect on the Cubic judgment, that judgment is "at issue" in Case No. B/61. Accordingly, by operation of law, by already accepting compensation from the United States Government, Elahi has relinquished "all rights" to execute against the Cubic judgment. Victims Protection Act § 2002(a)(2)(D), (d)(5)(B) (as amended by TRIA § 201(c)(4)); 68 Fed. Reg. at 8080.

As to the statutory distinction between attachment of the property of a foreign state and attachment of the property of a foreign state's agencies and instrumentalities, addressed in the Supreme Court opinion *supra,* the U.S. brief stated as follows.

---

* * * *

The Ministry contends that it is a core component of the Iranian Government and therefore is subject only to the limited exceptions to attachment set out in Section 1610(a), not a separate "agency or instrumentality" subject to the broader exceptions set out in Section 1610(b). Ministry Supp. Br. 7-14. The United States agrees.

* * * *

It would be extraordinary for a foreign state to constitute its ministry of defense as a "separate legal person," 28 U.S.C. § 1603(b)(1), with "independence from close political control," *Bancec*, 462 U.S. at 624. A foreign state's organization of its defense ministry as a "separate" entity would, by definition, provide the foreign state with diminished control over an obviously core sovereign function. In addition, a foreign state's constitution of its ministry of defense as a "separate legal person" would subject the ministry to diminished immunity from suit and attachment of its property in foreign countries in which it may have a presence.

* * * *

Here, Elahi has presented no evidence that the Ministry is a "separate legal person" distinct from the Iranian state. Elahi contends that, under *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec),* 462 U.S. 611 (1983), the Ministry is a "separate legal person" merely because the Ministry can "enter into contracts and [can] pursue legal actions in [its] own name." But in *Bancec*, the Supreme Court made it clear that an entity "extensively controlled," 462 U.S. at 629, by a foreign state is not a separate legal person under the FSIA even if it is established under foreign law "with full juridical capacity * * * of its own," 462 U.S. at 613. Applying that principle, the Supreme Court held that Bancec, which under Cuban law, was "[a]n official autonomous credit institution for foreign trade," was liable for a claim against Cuba. *Ibid.*

Elahi has not shown that the Ministry of Defense has "independence from" Iran's "close political control." *Id*. at 624. He has presented no evidence that the Ministry is run as a distinct economic economic enterprise, responsible for its own finances. *See id*. at 624-25. And Elahi has not established that the Ministry engages in anything other than core governmental functions. Consequently, Elahi has failed to overcome the presumption that the Ministry is an inseparable part of the Iranian state.

Finally, the U.S. brief addressed Elahi's claim that, even if the Ministry of Defense were the foreign state, he could still attach the Cubic judgment under § 1610(a) because it is

"property 'used for a commercial activity in the United States.'"

---

* * * *

Because the Defense Ministry is an inseparable part of the Iranian state, Section 1610(a) of the FSIA determines whether its property is subject to attachment. Elahi claims that he may attach the Cubic judgment under Section 1610(a) because, he contends, "it is property 'used for a commercial activity in the United States.'". . . . Whether property is subject to attachment under Section 1610(a) depends on whether a foreign state is using that specific property for a commercial activity; it does not depend on how the property was created.

As we explained, when Congress "lower[ed] the barrier of immunity from execution" in Section 1610, it was more protective of foreign state property than it was of property belonging to a foreign state's agencies or instrumentalities. H.R. Rep. No. 1487, at 27. "Subsection (a) allows courts to execute only when the property is 'used for a commercial activity,' whereas subsection (b) permits execution of 'any property,' regardless of its use." *Republic of Congo*, 309 F.3d at 253.

Making a state's use of property the critical inquiry for execution rather than the question of whether the state has engaged in commercial activity "helps accomplish the purpose of limiting execution against property directly belonging to a foreign state more severely than execution against property belonging to an instrumentality." *Ibid*. The premise for this disparate treatment "is that agencies or instrumentalities engaged in commercial activity are akin to any other player in the market, and that their functions are primarily commercial. On the other hand, the 'primary function of states is government.'" *Ibid*. (citation omitted) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 460 cmt. b (1987)). Restricting execution to property used by a foreign sovereign for commercial activity ensures that the execution will not interrupt the public or sovereign acts of the state. *Ibid*.

Elahi's argument collapses the critical distinction between Sections 1610(a) and (b) because it permits attachment of a foreign state's property based on the fact that the foreign state has *previously* engaged in commercial activity. But as the Fifth Circuit has explained, "[t]he focus in subsection (a) is plainly on the 'use' to which the property is put." *Republic of Congo*, 309 F.3d at 253. Thus, an airplane used solely to shuttle a foreign head of state is not "used for a commercial activity," even if the foreign state obtained the airplane through a commercial transaction. *Republic of Congo*, 309 F.3d at 253; *see* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of * * * [the] act."). Similarly, a monetary judgment that is the end product of litigation is not "used for a commercial activity," simply because that the litigation concerned a commercial transaction.

As Elahi has provided no other basis for concluding that the Ministry has used Cubic judgment for a commercial activity in the United States, he has failed to establish a right to attach the judgment under Section 1610(a).

(2) Presumption of immunity for foreign state property: Rubin v. Iran

See U.S. Statement of Interest filed March 3, 2006, in *Rubin v. Iran*, discussed in 1.a.(4) *supra.*

(3) Attachment of diplomatic properties: FG Hemisphere Associates, LLC v. Democratic Republic of Congo

(i) Excusable neglect

On May 19, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated a district court order denying defendant's motion to quash an execution order against two Washington, D.C. dwellings owned by the Democratic Republic of Congo ("DRC"). *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006). The Republic of Zaire, as the DRC was known at the time, had

originally bought both properties to serve as diplomatic residences. The court explained:

> . . . DRC diplomatic officials resided in these properties by virtue of their official capacities up until the mid-1990s, when political disruption led to their removal from office but not from the properties. (In 2005-06, the DRC succeeded in recovering the properties for use as diplomatic residences.) FG Hemisphere's predecessor-in-interest obtained a default judgment against the DRC for breach of a credit agreement [involving a state-owned electric company Societe Nationale d'Electricite ("SNEL")] unrelated to the properties. FG Hemisphere then sought writs of execution against the two properties . . . The DRC again defaulted. Some two months later, the DRC filed a Rule 60(b) motion to quash the execution order, arguing, among other things, that its failure to respond earlier was due to "excusable neglect" and that the two properties were immune from execution under 28 U.S.C. § 1609 as "property in the United States of a foreign state."

The appellate court agreed that the DRC's "neglect in the delay of its response to the motion to execute was excusable" and "that the DRC's claim of immunity is potentially meritorious." It therefore reversed the district court's denial of the DRC's motion, vacated its order granting plaintiff's motion to execute, and remanded for a determination on the merits of the DRC's claims of immunity.

---

* * * *

. . . On March 14, 2005, FG Hemisphere filed an amended motion . . . seeking to execute on [the] two pieces of DRC real property in Washington, D.C. . . .

On filing the Motion to Execute, FG Hemisphere arranged to deliver it by DHL courier service to the DRC. On March 22—eight days after the motion was filed—the mail department in the DRC Foreign Ministry's Office of Protocol received and signed for the DHL package in Kinshasa, the DRC capital. As delivered,

the motion was in English; the DRC's official language is French. Two days later, the district court granted the Motion to Execute ("March 24 Order").

Meanwhile, in Kinshasa the DHL package made its bureaucratic rounds. It went first to the Bureau of Translation, and after translation into French, on to SNEL. SNEL forwarded the package to the Office of Protocol, from which it went first to the Office of Legal Affairs and then, in late May, to the Foreign Minister's Chief of Staff. For reasons that aren't entirely clear, ex-ambassador [of the DRC to the United States Oscar Tatanene] Manata learned of the Motion and phoned to alert the Chief of Staff before it arrived in his Kinshasa office. On May 4, evidently no more than a day after the alert from Manata, the current Ambassador of the DRC, Faida Mitifu, was directed to secure counsel. This was more than 40 days after the district court granted the Motion to Execute and, of course, before receipt of the Motion by the Chief of Staff.

The DRC then (1) moved to quash the writs of execution on May 31, (2) filed a Rule 60(b) motion to vacate the March 24 Order on July 7, and (3) filed a Rule 62 motion to stay the execution on July 8. On August 11—the same day that the United States filed a Statement of Interest—the district court denied the DRC's three motions without opinion. The DRC appeals, arguing that the district court erred because (1) the March 24 Order was void under Rule 60(b)(4) for lack of jurisdiction and/or notice, and (2) the DRC's delay in its response to the Motion to Execute qualified as excusable neglect under Rule 60(b)(1).

* * * *

Rule 60(b)(1) provides that a court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1). In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), the Supreme Court held that the determination of excusable neglect is an equitable matter and identified several relevant factors: the risk of prejudice to the nonmovant, the length of delay, the reason for the delay, including whether it was in control of the movant, and whether the movant acted in good faith. *Id.* at 395-97. . . .

The factors listed by *Pioneer* are of course not exclusive. . . . In a case applying other sections of Rule 60(b), we've stressed a foreign sovereign's interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status. "Intolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *Practical Concepts Inc. v. Republic of Bolivia*, 258 U.S. App. D.C. 354, 811 F.2d 1543, 1551 n.19 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (internal quotation, brackets, and ellipsis omitted). . . .

Apart from the United States's interest in assuring foreign nations' ability to rely on the U.S. courts, the express *Pioneer* factors favor the DRC. The duration of the delay, to be sure, is hard to calculate because of uncertainty over when the starting shot was fired—that is, when the DRC received the relevant notice. . . .

* * * *

With the Motion to Execute as the starting point, the roughly two month delay between the deadline to respond to the Motion and the DRC's response (and two-and-a-half month delay between the Motion's filing and DRC's response) was relatively short, especially in light of the distance between the DRC and the U.S. . . .

* * * *

. . . [T]he failure to file a timely response was in considerable measure out of the DRC's control. The movant's use of English rather than French virtually guaranteed the DRC's inability to file a timely response. Although we do not rule on the argument that service should have been governed by FSIA's service provision, 28 U.S.C. § 1608(a), we note that § 1608(a) calls for translation by the serving party, thus facilitating the sovereign's ability to make a timely response and tending in part to overcome what *Practical Concepts* recognized as the "perils of converting the legal terms and concepts of one system into those of another." 811 F.2d at 1546. . . . Further, it seems likely that much of the Motion's bouncing around the various departments within the DRC was due to

substantial political and institutional differences between the United States and the DRC, which *Practical Concepts* exhorts us to consider. See 811 F.2d at 1546. Finally, of course, the DRC was plainly hampered by its devastating civil war, which cost over three million lives, shattered the DRC's already shaky political structure, and set off hyperinflation that peaked at over 500% per year in 2000. It is not surprising that the war would be accompanied by substantial confusion over responsibilities in the Foreign Ministry—indeed the Office of the Foreign Minister itself appears not to have any record of receiving the Motion. Cf. *Brenner v. Shore*, 34 Ohio App. 2d 209, 297 N.E.2d 550, 553-54 (Ohio Ct. App. 1973) (vacating default judgment under parallel state rule 60(b)(1) because of "complete physical and mental collapse" of defendant).

* * * *

Finally, our cases (and those of other circuits) antedating *Pioneer* generally required a party seeking relief on grounds of excusable neglect to assert a potentially meritorious defense. . . .

The DRC has met easily that standard. Under the FSIA the property of a foreign state is immune from execution subject to certain exceptions, 28 U.S.C. § 1609, the one asserted by FG Hemisphere being use of the property "for a commercial activity in the United States." 28 U.S.C. § 1610(a). See also 28 U.S.C. § 1603(d) (defining commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act"); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) (concluding "that when a foreign government acts . . . in the manner of a private player within [a market], the foreign sovereign's actions are 'commercial' within the meaning of the FSIA"). While FG Hemisphere bears the burden of producing evidence to show that immunity should not be granted, the DRC bears the ultimate burden of persuasion (i.e., to show that the commercial-activity exception does not apply). See *Princz v. Federal Republic of Germany*, 307 U.S. App. D.C. 102, 26 F.3d 1166, 1171 (D.C. Cir. 1994); *Robinson v. Government of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001). FG Hemisphere asserts that the commercial activity exception applies to the two dwellings because they have been occupied by persons other than accredited

diplomats for over ten years and thus, FG Hemisphere asserts, are presumably held as "investment[s] in a rapidly-appreciating real estate market."

We are unconvinced. The fact that former diplomats squatted on the properties says little. FG Hemisphere's labeling the DRC as canny is implausible; the DRC entirely failed to collect rent on the properties for over a decade. FG Hemisphere counters that this was a payoff to the former diplomats and hence a form of imputed rent to the DRC. But the far more likely explanation for the failure to pursue the squatters is that the DRC's political condition (including civil war) disabled its government from effectively protecting the state's interests. It appears undisputed that the Glenbrook and Linnean sites have been and are intended to be used as diplomatic residencies of DRC officials. Both the State Department and the District of Columbia have recognized the properties as diplomatic—and do so to this day. While the holdover diplomats may have invoked non-payment of wages to justify squatting, there is nothing to show that the DRC conceived of the relation as an indirect way of providing compensation. (We pass no judgment on whether, if such a relation existed, it would qualify as commercial.) So far as the record now appears, there is thus no evidentiary basis for believing that the properties have been "used for a commercial activity."

* * * *

(ii) Immunity from attachment under FSIA

The United States filed a brief as *amicus curiae* on December 5, 2005. Corrected Brief for the United States as *Amicus Curiae* Supporting Appellant Democratic Republic of Congo. The brief explained:

> The United States has a significant interest in the proper application of the Vienna Convention and the FSIA to properties owned by foreign states in the United States—particularly properties claimed to be the premises of foreign missions. Under the Vienna Convention, the United States has a treaty obligation to protect the premises

> of foreign missions in this country. Vienna Convention, Art. 22(2). Likewise, under the Foreign Missions Act, 22 U.S.C. 4301-4316, Congress has directed the Secretary of State to assist "agencies of Federal, State, and municipal government" in ensuring that foreign missions are accorded all proper privileges and immunities. 22 U.S.C. 4303(1).
>
> The district court's order erroneously permits the forced sale of properties that are immune from execution under both the FSIA and the Vienna Convention. Such a sale would not only have a significant and damaging impact on this country's relations with the DRC, but would also disrupt our relations with other nations by undermining the inviolability of their diplomatic mission premises in the United States. Moreover, in light of the reciprocal nature of diplomatic relations, the inviolability of United States missions abroad could be put at risk.

In its *amicus* brief, the United States argued that "[s]ignificantly for this case, a foreign state's immunity from enforcement under the FSIA is considerably broader than its immunity from the jurisdiction of federal and state courts." Because the properties were not being "used for a commercial activity," they were immune from attachment under the FSIA, 28 U.S.C. § 1610(a). Excerpts follow from the brief's discussion of the distinction between jurisdictional and immunity from attachment immunity provided under the FSIA. *See* C.2. below for excerpts addressing diplomatic immunity. (Because the United States was a party to the Vienna Convention on Diplomatic Relations at the time of enactment of the FSIA, its applicability is preserved in § 1604 of the FSIA). The full text of the *amicus* brief is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

II. THE DISTRICT COURT'S REFUSAL TO QUASH THE WRITS OF EXECUTION CONSTITUTED REVERSIBLE ERROR.

FG's motion for authority to execute on the two DRC properties raised for the first time the question of the properties' immunity

from execution under the 28 U.S.C. 1609 and 1610(a), an issue distinct from the DRC's jurisdictional immunity in the underlying action. Congress cannot have intended to recognize that distinct immunity without also intending that foreign states have a meaningful opportunity to assert it. In light of the FSIA, it is therefore essential that foreign states have adequate notice of any effort to execute against their property and opportunity to be heard. At the very least, the district court should not have acted on FG's motion for execution before the response time under the court's own rules had expired. Moreover, local law suggests that the lower court was obligated, when it considered the DRC's motion to quash the writs, to decide the merits of its claims that the properties are immune.

1. As already discussed, "the FSIA preserved a distinction between two different aspects of foreign sovereign immunity: jurisdictional immunity—that is, a foreign sovereign's immunity from actions brought in United States courts—and immunity from attachment—a foreign sovereign's immunity from having its property attached or executed upon." *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Syst., Inc.*, 385 F.3d 1206, 1218 (9th Cir. 2004).

The FSIA reflects Congress's recognition of the significant treaty and statutory immunities that can be implicated in executing a judgment against a foreign state's property. Departing from the model of private litigation, where execution can often be obtained by application to a court clerk or local sheriff, Congress in Section 1610(c) required that attachment or execution against a foreign state's property be ordered by "the court," and only after a judicial determination "that a reasonable period of time has elapsed following the entry of judgment" or notice of a default judgment. 28 U.S.C. 1610(c).

Because a foreign state's immunity from jurisdiction and immunity from execution are distinct interests, it is irrelevant to application of the latter immunity here that the district court had jurisdiction over the DRC in FG's suit to confirm the arbitral award and that the DRC defaulted in that action. As the Fifth Circuit has noted, there is nothing improper about a foreign state choosing to default in litigation as to which it has no defense against liability. *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d

240, 251 (5th Cir. 2002). Defaulting as to liability does not constitute waiver of the foreign state's immunity from execution. *Id.*

This Court has recognized that a foreign state "may refrain from appearing, thereby exposing [itself] to the risk of a default judgment," and later, "[w]hen enforcement of the default judgment is attempted * * * [it] may assert [its] jurisdictional objection." *Practical Concepts, Inc.*, 811 F.2d at 1547. Although the immunity that Bolivia was permitted to assert at the enforcement stage in *Practical Concepts* was its immunity from the district court's jurisdiction over the underlying claim, the Court's holding presupposes both the propriety of defaulting in certain circumstances and that there will be a meaningful opportunity for the foreign sovereign to be heard nevertheless at the enforcement stage to assert its immunity. Here, the DRC's assertion of its immunity was even more obviously timely than was Bolivia's. Because DRC's arguments relate *exclusively* to the immunity of its property from execution, the point of execution is the *only* time at which those arguments could properly be raised.

* * * *

2. Immunity of Foreign Officials For Official Acts

On November 17, 2006, the United States filed a Statement of Interest in the U.S. District Court for the Southern District of New York addressing the immunity of Avraham Dichter, former Director of Israel's General Security Service, to claims brought against him for his role in an Israeli military attack in the Gaza Strip in July 2002. *Matar v. Dichter*, 05 Civ. 10270 (WHO). For the background of the suit and U.S. arguments that it would be an improper exercise of the court's discretion to create a cause of action to cover the claims in this case under the Alien Tort Statute or the Torture Victim Protection Act, *see* Chapter 6.I.1.e. and 2.a.

Further excerpts below from the U.S. Statement of Interest provide its view that "foreign officials such as Dichter do enjoy immunity from suit for their official acts . . . rooted in longstanding common law that the FSIA did not displace."

Most footnotes have been omitted from the excerpts that follow; the full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

* * * *

A. Foreign Officials Enjoy Immunity at Common Law for Their Official Acts, Which Was Not Displaced by the FSIA

The parties' immunity arguments in this case center on the FSIA: Dichter claims that he is entitled to the statute's protection, . . . while plaintiffs argue that "[t]he FSIA does not extend sovereign immunity to individuals". . . . This emphasis on the FSIA is understandable given that, following the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), a number of courts have analyzed the immunity of individual foreign officials under the statute's rubric. . . .

In the Government's view, however, this emphasis is misplaced. The Government agrees with Dichter that he is entitled to immunity, but that immunity resides in common law rather than the FSIA. As explained below, individual foreign officials have long been recognized to hold immunity from suit with respect to their official acts. Contrary to plaintiffs' argument, this immunity was not displaced by the enactment of the FSIA. Rather, common-law immunity for foreign officials endures as a vital complement to the FSIA's grant of immunity to foreign states—for, absent the former, litigants could easily circumvent the latter, frustrating the important purposes served by the statute.

1. Immunity for Foreign Officials Acting in an Official Capacity Was Well-Established at Common Law prior to the Enactment of the FSIA

a. Official Immunity before the Issuance of the Tate Letter in 1952

The doctrine of foreign sovereign immunity, broadly construed, extends deep into American jurisprudence, having been established

as a matter of common law well before Congress enacted the FSIA in 1976. As the Supreme Court stated two decades prior to the FSIA's enactment: "Very early in our history this immunity was recognized, and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358-59 (1955) (citations omitted).

The seminal expression of the sovereign immunity doctrine was set forth nearly 200 years ago by Chief Justice Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden v. B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). *The Schooner Exchange* also introduced the practice of deferring to "suggestions of immunity" by the Department of State wherever made in individual cases, or, in the absence of such determinations, deferring to State Department policies concerning foreign immunity generally. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943). This deference reflected a basic function of foreign sovereign immunity—the avoidance of cases that might fray relations with foreign sovereigns—and the corresponding need to follow the lead of the Executive as the branch of government responsible for foreign affairs. *See Hoffman*, 324 U.S. at 35. . . .

The "absolute" immunity of the sovereign was, early on, generally understood to encompass not only the state and the head of state, but also other individual officials insofar as they acted on the sovereign's behalf. Thus, even prior to the *Schooner Exchange* case, statements recognizing immunity for the official acts of foreign officials appear in the opinions of the Attorney General. *See* 1 Op. Att'y Gen. 45, 46 (1797) (concerning civil suit brought against governor of French island for seizure of a ship . . .); 1 Op. Att'y Gen. 81 (1797) (concerning suit brought against British official . . .)

Expressions of official-act immunity likewise appear in subsequent federal case law. Thus, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit brought against a Venezuelan general for acts undertaken in his official capacity in Venezuela, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts

done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252[4]. The more common fact pattern, though, involved suits against consular officials, who by virtue of their position had a regular presence within the United States. Unlike diplomatic officials, whose immunity extended even to acts of a personal nature, consular officials were viewed as possessing the same immunity as a state's nondiplomatic officers generally—*i.e.*, immunity from suit only for acts within the scope of their official duties. *See Arcaya v. Paez*, 145 F. Supp. 464, 466-467 (S.D.N.Y. 1956) . . . *see also Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929). . . . Thus, prior to 1952, which marks the beginning of modern sovereign immunity jurisprudence in the United States, foreign officials were already understood to enjoy immunity for their official acts.

b. Official Immunity after the Tate Letter

In 1952, the State Department issued the Tate Letter, which announced that the Department would no longer follow the absolute theory of sovereign immunity set forth in *The Schooner Exchange*. Instead, the letter explained that the Department would follow the so-called "restrictive theory" of sovereign immunity, according to which a foreign state enjoys immunity as to its "public," *i.e.*, sovereign, activities, but not for its "private," *i.e.*, commercial, activities. *See generally Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 697-706 (1976); *see also id.* 712-15 (appended text of Tate Letter). This evolution in policy reflected similar developments in foreign jurisdictions, driven by "the widespread and increasing practice on the part of governments of engaging in commercial activities." *Id.* at 714.

The adoption of the restrictive theory did not change the rule applicable to individual officials, however. As before the Tate Letter, the State Department continued to recognize the immunity

[4] Although the holding in *Underhill* is more widely cited as an expression of the "act of state" doctrine, the Supreme Court has recognized that "sovereign immunity provided an independent ground" for the holding. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

of foreign officials for their official acts in suggestions of immunity made to the federal courts. *See* Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.) ("Immunity Decisions Report"), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, at 1020, 1037 (No. 19), 1075-77 (Nos. 96 & 97) (reporting suggestions of immunity for individual officials). Likewise, the federal courts continued to defer to such suggestions when they were presented. *See Greenspan v. Crosbie*, No. 74 Civ. 4734 (JCM), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960). And where no suggestion was made, courts applied the same general rule of decision. *See Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting in *dicta* that the immunity of a foreign state extends to any official or agent of the state with respect to their official acts). Thus, the Restatement (Second) of Foreign Relations Law of the United States (1965), published during this time period, includes official-act immunity among the various dimensions of immunity belonging to foreign sovereigns.

Notably, in at least one of the post-Tate Letter cases, *Greenspan v. Crosbie*, *supra*, the immunity of individual foreign officials was recognized to be unlimited by the restrictive theory's exceptions to immunity for commercial activity—and thus broader than the immunity of the state itself. In the case, plaintiffs sued the Province of Newfoundland and three of its individual officials for alleged violations of U.S. securities laws. 1976 WL 841, at *1. Pursuant to the restrictive theory, the Department of State determined that the Province was *not* immune from claims for compensatory damages with respect to the securities sales at issue, given that the sales constituted commercial activity. *Id.*; *see also* Immunity Decisions Report at 1076. The Department nevertheless filed a suggestion of immunity recognizing the individual officials to be fully immune for their participation in this same activity, reasoning: "although it is alleged that the defendant officials of the Province of Newfoundland acted in excess of their authority, it is not alleged that these officials acted other than in their official capacities and on behalf of the Province." Immunity Decisions Report at 1076. Accordingly, this Court declined to exercise jurisdiction as to these individual defendants, finding that "[t]he Suggestion of Immunity

removes the individual defendants from this case"—even while the court went on to exercise jurisdiction as to the Province itself. *Greenspan*, 1976 WL 841, at *2. Hence, the State Department recognized, and this Court accepted, that insofar as the individual defendants had acted on behalf of the state, their actions were not attributable to them in their personal capacity; they were instead attributable only to the state, and accordingly the state was the only proper defendant in the case.[6] Decided in late 1976, *Greenspan* reflects the scope of common-law immunity for individual foreign officials as it existed when the FSIA was enacted that same year.

2. *The FSIA Did Not Displace Common-Law Immunity for the Official Acts of Foreign Officials*

a. Statutory Text and Legislative History

Contrary to plaintiffs' apparent position that the enactment of the FSIA in effect "eliminated" sovereign immunity for "individuals acting in their official capacity," there is no suggestion anywhere in the FSIA's text or legislative history that the statute was intended to effect any change whatsoever in the immunity previously recognized for individual foreign officials. The text of the statute makes no mention of the immunity belonging to individual foreign officials, but rather speaks only to the immunity of "foreign states" and any "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1605, 1610. Likewise, the legislative history's only reference to any type of individual official—diplomatic or consular representatives—clarifies that the FSIA does not govern their immunity since the statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976), 1976 U.S.C.C.A.N. 6604, 6620 ("FSIA House Report"). The statute's exclusive focus on states and their agencies and instrumentalities is explained by

[6] This application of immunity resembles the way in which immunity for federal employees works under the Federal Tort Claims Act ("FTCA"). Under the so-called "Westfall Amendment" to the Act, in any tort action filed against a federal employee, the United States is substituted as party defendant upon certification by the Attorney General that the acts at issue were performed in the employee's official capacity. *See* 28 U.S.C. § 2679(d).

the history leading up to its enactment. The fundamental problem Congress sought to address at the time was an ongoing explosion in commercial litigation against foreign states and state enterprises engaged in commerce with the United States, and the concomitant need to regularize such litigation under a system of clear and predictable rules. . . . By contrast, cases particularly concerning individual foreign officials had posed no significant problems in the past and were not the impetus for the new legislation. *Cf. Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001) (concluding that issues regarding head-of-state immunity "were not yet 'in the air' as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment"), *rev'd in part on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

Accordingly, there is no reason to believe that in enacting the FSIA, Congress intended, *sub silentio*, to alter or eliminate the pre-existing common-law immunity for individual foreign officials. Indeed, the FSIA was not intended to effect *any* major change from the *status quo ante* with respect to substantive rules of immunity. . . .

Indeed, in the compilation of the State Department's pre-FSIA immunity decisions published immediately after the FSIA's enactment, the editors—officials of the State Department and Department of Justice who had been involved in the statute's drafting—specifically noted that the FSIA was not intended to eliminate the precedential effect of past "decisions concerning the immunity of heads of state and of other nondiplomatic and nonconsular officials." Immunity Decisions Report at 1020. As the editors noted: "These decisions may be of some future significance, because the [FSIA] does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities." *Id.*

b. Post-FSIA Case Law

Reading the FSIA to eliminate immunity for individual foreign officials would conflict not only with the statute's text and legislative history, but also with post-FSIA case law. Since the statute's enactment, numerous circuit courts have continued to recognize the existence of

immunity for individual foreign officials with respect to their official acts,[9] as have numerous judges in this district.

In so holding, courts have broadly agreed on the functional rationale for this immunity—*viz.*, that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.2d at 1101; *accord*, *e.g.*, *Velasco*, 370 F.3d at 399; *In re Terrorist Attacks*, 349 F. Supp. 2d at 788; *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *see also Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990) (finding sovereign immunity to protect individual officers on the ground that "a government does not act but through its agents"). Hence, courts have recognized, rightly, that unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA. *See Chuidian*, 912 F.2d at 1102 ("Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly."). However, while the rationale for the immunity recognized in these cases has thus been cogently identified, the source of the immunity has not been. In *Chuidian*, the leading circuit case, the Ninth Circuit identified the FSIA as the source; specifically, the court held that individual officials fall within the statute's definition of an "agency or instrumentality of a foreign state" and so possess the same immunity afforded to such entities under the statute. 912 F.2d at 1103. In reaching this holding, the court unnecessarily and erroneously rejected the Government's

[9] *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 402 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). In the one exception cited by the plaintiffs—*Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005)—the court found only that such immunity was not provided *by the FSIA*. *Id.* at 882 ("[W]e conclude, based on the language of the FSIA, that the FSIA does not apply to General Abubakar. . . ."). The court was not presented with, and thus had no occasion to consider, the Government's argument here, *viz.*, that such immunity is rooted in common law that was unaffected by the FSIA's enactment.

10-Cummins-Chap10.indd 636 10/22/07 11:43:15 PM

position—which was the same as the position asserted here—that immunity for foreign officials is instead rooted in the common law. *Id.* at 1102-03. A number of other courts have followed *Chuidian* in this respect, though without significant analysis, and without the benefit of briefing by the Government. *See, e.g.*, *El-Fadl*, 75 F.3d at 671; *Keller*, 277 F.3d at 815.[11] Other courts, however, have declined to read the FSIA's "agency or instrumentality" definition as encompassing natural persons, but nonetheless have recognized a "judicially created" extension of the statute's protection to individual officials. *Velasco*, 370 F.3d at 398-99 ("Although the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state."); *Herbage*, 747 F. Supp. at 66 ("Nowhere does the FSIA discuss the liability or role of natural persons. . . . Nonetheless, decisions in other federal courts, as well as reason, indicate—even if only indirectly—that the sovereign immunity granted in the FSIA does extend to natural persons acting as agents of the sovereign."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1120 (D.D.C. 1996) (same).

The latter line of cases is closer to (though still wide of) the mark; for, while *Chuidian*'s result was correct, its statutory interpretation is unpersuasive. The *Chuidian* court based its holding on the flawed premise that "a bifurcated approach to sovereign immunity was not intended by the Act"—*i.e.*, that Congress intended the FSIA to be a "comprehensive" statute governing all sovereign immunity determinations, regardless of the nature of the defendant. *See Chuidian*, 912 F.2d at 1102. As indicated above, such a reading of the statute is inconsistent with its text and legislative history. . . . Moreover, courts have in fact followed such "a bifurcated approach to sovereign immunity" in cases involving heads of state. . . .

Further, *Chuidian*'s attempt to stretch the FSIA's "agency or instrumentality" definition to cover individual officials leads to

[11] Although the Government agreed with the result in *Chuidian*, it has never endorsed the *Chuidian* approach to foreign official immunity and has not filed any brief revisiting the source of foreign official immunity since *Chuidian* was decided.

problematic results. For example, this reading implies that individual officials are subject to the same *exceptions* to immunity laid out in the FSIA for states and their agencies and instrumentalities—such that if an individual foreign official were sued, for example, over commercial transactions undertaken in an official capacity, the official would not be immune from suit and could be held personally liable for the conduct at issue. *See Chuidian*, 912 F.2d at 1103-06 (considering, after finding individual official's immunity to be governed by the FSIA, whether any of the FSIA's exceptions were met). This result diverges from the common law as it existed at the time of the FSIA's enactment. As reflected in *Greenspan v. Crosbie*, *supra*, the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be. . . . Thus, by subjecting the immunity of individual officials to the same limits applicable to the immunity of states and their agencies or instrumentalities, the *Chuidian* court's construction leaves foreign officials with less immunity than they enjoyed before the FSIA's enactment. This change in substantive law was unanticipated not only by Congress, but apparently by the *Chuidian* court itself—which thought its reading of the FSIA's "agency or instrumentality" definition would *preserve* the immunity previously afforded to individual officials under common law. *See Chuidian*, 912 F.2d at 1101 ("If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law.")

Along similarly problematic lines, *Chuidian* would also seem to imply that an individual official's *personal* property qualifies as property of a state agency or instrumentality, making it subject to attachment according to the rules set forth in § 1610—even though § 1610 was clearly intended to apply only to state-owned assets. *See* FSIA House Report at 27-30, 1976 U.S.C.C.A.N. at 6626-29. Notably, § 1610 affords litigants broader attachment rights with respect to property of state agencies or instrumentalities compared to property of the state itself: so long as an agency or instrumentality is "engaged in commercial activity in the United States," any of

its property can be attached to satisfy any claim as to which it lacks immunity from suit. *See* 28 U.S.C. § 1610(b); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984). Thus, were "agency or instrumentality" read to encompass individual officials, litigants in any action brought under the FSIA would have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize the potential for recovery and to circumvent the FSIA's limitations on attachment of property of the state itself. It defies common sense to believe that Congress intended these consequences.[16]

Accordingly, this Court should find Dichter to be immune from suit for his official acts and should rest this holding on common law rather than any provision of the FSIA. While official immunity serves, importantly, to prevent circumvention of the FSIA, it is not itself codified in the FSIA, but instead is afforded by common law that the FSIA did not displace. This holding would be consistent with the results reached in the accumulated post-FSIA case law on point, yet at the same time would avoid the conceptual difficulties and troublesome implications entailed by the *Chuidian* approach.[17]

---

[16] Yet another problem concerns service of process. The FSIA imposes stricter requirements for service of process on a foreign state as opposed to its agencies or instrumentalities. *See* 28 U.S.C. § 1608; *see also, e.g.*, *Magness v. Russian Federation*, 247 F.3d 609, 614-617 (5th Cir. 2001). Under the *Chuidian* approach, litigants in any FSIA case might circumvent those stricter requirements by suing, and, accordingly, serving, an individual official rather than the state itself.

[17] Even if the FSIA did govern the immunity of a foreign official, however, Dichter would be entitled to immunity, and plaintiffs' claims brought under the ATS and the TVPA would be subject to dismissal. As the Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the ATS does not supply a jurisdictional basis for claims against a foreign state since the FSIA is "the sole basis for obtaining jurisdiction of a foreign state in our courts." *Id.* at 434. Moreover, the FSIA does not recognize an exception to immunity for torts committed outside the territory of the United States. *Id.* at 439-43. The FSIA thus bars plaintiffs from bringing their ATS and TVPA claims against Israel and, accordingly, would bar such claims against Dichter were his immunity governed by the statute as well.

10-Cummins-Chap10.indd 639 10/22/07 11:43:16 PM

c. International Law

A final reason to reject the idea that the FSIA eliminated immunity for individual foreign officials is that any such holding would bring U.S. sovereign immunity law into conflict with customary international law. The FSIA was enacted partly in order to bring U.S. foreign immunity law into line with prevailing international practice, *see* FSIA House Report at 7-8, 1976 U.S.C.C.A.N at 6605-06, and should be construed compatibly with customary international law absent a specific reason to the contrary. As stated by the district court in *Tachiona*:

> Authorities recognize that the growth of international law is evolutionary. It expands by accretion as consensus develops among nations around widely recognized customs, practices and principles, and not by patchwork elevation of any one country's *ad hoc* pronouncements. Thus, any dramatic deviation from accepted international norms legislated by any single state without reference to widely accepted customary rules would be inconsistent with this principle.

169 F. Supp. 2d at 276-77; *cf. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135 (2d Cir. 2005) ("[W]here legislation is ambiguous, it should be interpreted to conform to international law.") (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Like U.S. law, customary international law has long recognized that foreign officials enjoy civil immunity for their official acts. As explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia:

> Such officials are mere instruments of a State and their official function can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity.' This is a well-established

> rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

Prosecutor v. Blaskic (Issue of subpoena duces tecum), 110 I.L.R. 607, 707 (1997) (citing cases).[18]

These principles have been applied in several significant foreign jurisdictions, some with immunity statutes that, like the FSIA, make no mention of individual officials. Thus, most recently, the House of Lords recognized immunity from civil suit for official-capacity acts even though the United Kingdom's immunity statute did not "expressly provide[] for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state"; the court reasoned that "[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones v. Ministry of Interior*, UKHL 26, ¶ 10 (House of Lords, United Kingdom 2006). Likewise, a Canadian appellate court has held that "[t]he fact that [Canada's immunity statute] is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law. . . . There is nothing in the State Immunity Act which derogates from the common law principle that, when acting in pursuit of their duties, officials or employees of foreign states enjoy the benefits of sovereign immunity." *Jaffe v. Miller,* 95 ILR 446, 459-60 (Ontario Court of Appeal, Canada 1993). Germany's national court has reached the same result. *Church of Scientology v. Commissioner of the Metropolitan Police*, 65 ILR 193 (Federal Republic of Germany, Federal Supreme Court 1978) (recognizing immunity for head of Scotland Yard: "The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them in a given case.").

The United Nations Convention on Jurisdictional Immunities of States and their Property ("UN Immunity Convention") embodies the most current effort to codify international law concerning

[18] Although this holding was rendered by a criminal tribunal, it specifically concerned an issue of civil process—specifically, the tribunal's power to enforce a subpoena to state officials acting in their official capacity.

foreign sovereign immunity. U.N. Doc. A/RES/59/38 (Dec. 16, 2004), *available at http://untreaty.un.org/English/notpubl/English_3_13.pdf*. While the United States has not signed the Convention and does not necessarily agree that the Convention accurately reflects customary international law in every particular, it does view the Convention's treatment of individual officials as consistent with customary international law to the extent that it clothes individual officials with the immunity of the state. The Convention generally grants immunity to states, and defines the term "State" to include "representatives of the State acting in that capacity." *See id.* Art. 2, ¶ 1(b)(4). As explained in the drafting committee's commentary, this provision reflects the understanding that official capacity acts are properly attributed to the state itself rather than the individual whom the state acts through:

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity.

Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session, ¶ 18, p. 25, U. N. Doc. A/46/10 (Jul. 19, 1991).

In light of all of the foregoing authorities, any reading of the FSIA that would eliminate the immunity historically recognized for individual foreign officials would constitute a "dramatic deviation

from accepted international norms," and should be rejected. *Tachiona*, 169 F. Supp. 2d at 276-77. Indeed, parting with this international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions. Given the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad—including damages suits arising from alleged war crimes.[20] The immunity defense is a vital means of deflecting these suits and averting the nuisance and diplomatic tensions that would ensue were they to proceed. It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn. As the Supreme Court has stated in a related context:

> In light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes combine to make our national interest in protecting diplomatic personnel powerful indeed.

Boos v. Barry, 485 U.S. 312, 323-24 (1988). Thus, this Court should adhere to prevailing international norms, which are reflected in our own common law, and afford Dichter immunity for his official acts.

---

[20] Even more worrisome, foreign *criminal* courts might look to U.S. civil immunity rules in an effort to justify assertions of jurisdiction over U.S. officials.

B. Dichter's Participation in Planning a Military Strike Constitutes an Official Act

1. Whether an Act Is Performed in an Official Capacity Turns on Whether the Act Is Attributable to the State, Not on Whether It Was Lawful

As a fallback position, plaintiffs argue that the defendant's acts, as alleged in the complaint, were not "lawfully within the scope of his authority," so they cannot be deemed official acts protected by official immunity. There is no merit in this argument.

Plaintiffs do not claim that the defendant's acts were actually unauthorized by the State of Israel. Rather, plaintiffs argue that the acts were not *validly* authorized because, according to plaintiffs, the acts were unlawful under international and Israeli law. The flaws in this logic are obvious. By definition, a civil lawsuit against a foreign official will challenge the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by such allegations alone. *See Waltier*, 189 F. Supp. at 321 n.6 (rejecting argument that foreign official's allegedly false statements could not be considered within the scope of his duties based simply on the premise that "wrongdoing is never authorized") (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.) ("[I]t can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine.")); *see also Herbage*, 747 F. Supp. at 67 (rejecting argument that officials lost immunity by virtue of "acting illegally," finding that conduct was within the scope of their official capacities); *Kline*, 685 F. Supp. at 390 (holding that plaintiff's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity"); *Jones*, UKHL 26, ¶ 12 ("The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity.").

Rather, the official-capacity test properly turns on whether the acts in question were performed on the state's behalf, such that they are attributable to the state itself—as opposed to constituting private conduct. This test flows directly from the principle underlying immunity for foreign officials, which is that an official acting in an official capacity is a manifestation of the state, and as such the official's acts are attributable to the state rather than to the official personally. Because an individual official cannot be sued for conduct of the state, the relevant inquiry is simply whether the official's actions constitute state conduct. *See Doe I*, 400 F. Supp. at 104 ("[S]uits against officers in their personal capacities must pertain to private action—that is, to actions that exceed the scope of authority vested in that official so that the official cannot be said to have acted on behalf of the state."); *see also El-Fadl*, 75 F.3d at 671 (dismissing on immunity grounds where defendant's activities "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]").[21]

Moreover, any contrary rule would create an easy end-run around the immunity of the state. The immunity of a foreign state is not subject to any roving "unlawfulness" exception but rather is subject only to those immunity exceptions specifically set forth in

[21] This view conforms to international law regarding when individual conduct is attributable to states. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Art. 4 (2001) *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Draft Article 7 specifies that the conduct of any person empowered to exercise governmental authority is considered conduct of the state under international law if the person acts in that capacity, even if the person exceeds his authority or contravenes his instructions. As the commentary of the International Law Commission further makes clear: "Cases where officials acted in their capacity as such, *albeit unlawfully or contrary to instructions*, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State." *Id.* commentary ¶ 7 (emphasis added); *see also, e.g.*, *Velasquez-Rodriguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4 (Inter-American Court of Human Rights 1989), ¶ 170 ("Under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of authority or violate internal law.").

10-Cummins-Chap10.indd 645 10/22/07 11:43:17 PM

the FSIA. *See Amerada Hess*, 488 U.S. at 433-35. Given that a foreign state's immunity under the FSIA does not dissipate upon mere allegations that its acts were unlawful, the immunity of the officials through whom the state acts must be similarly resilient. Any gap in the officials' immunity would simply "allow[] litigants to accomplish indirectly what the Act barred them from doing directly." *Chuidian*, 912 F.2d at 1102; *see also Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002) (in determining whether acts at issue were performed in an official capacity, courts should consider "whether [the] action against the foreign official is merely a disguised action against the nation that he or she represents" and "whether [the] action against the official would have the effect of interfering with the sovereignty of the foreign state that employs the official"). Indeed, in *Amerada Hess*, which involved the bombing of a neutral ship by the Argentine military, the Supreme Court specifically held that a foreign state's immunity was not subject to any general exception for alleged violations of international law brought under the Alien Tort Statute. *Id.* at 435-43. By plaintiffs' logic, the litigants in *Amerada Hess* could have avoided this result simply through the contrivance of naming the bomber pilot or defense minister as defendant rather than the Argentine government itself. Such a glaring loophole in the immunity afforded to state conduct would render the Supreme Court's holding in the case a practical nullity.

Here, plaintiffs' complaint clearly concerns state conduct. . . .

Accordingly, the actions alleged were clearly undertaken in Dichter's official capacity and cannot form the basis for a suit against Dichter personally. *See Doe I*, 400 F. Supp. 2d at 105 ("Plaintiffs do not present legitimate claims against the individual Israeli defendants in their personal capacities. . . . All allegations stem from actions taken on behalf of the state and, in essence, the personal capacity suits amount to suits against the officers for being Israeli government officials.").

2. There Is No Exception to the Immunity of Individual Officials for Alleged Jus Cogens Violations

Contrary to plaintiffs' contentions, nothing in the foregoing analysis is changed by the fact that plaintiffs allege that defendant's

conduct violated *jus cogens* norms.[23] Plaintiffs argue that because a *jus cogens* norm "by definition permits of no derogation . . . Israel could not authorize the acts alleged." But this is simply another variation of the argument that "wrongdoing is never authorized." *Waltier*, 189 F. Supp. at 321 n.6. The principle that a *jus cogens* norm permits of no derogation merely implies that any derogation from the norm will be unlawful; it does not imply anything about the identity of the actor responsible for the derogation. Here, assuming *arguendo* that the specific conduct plaintiffs allege constituted violation of a norm that the United States would recognize as a *jus cogens* violation, the violation would remain attributable to the state itself rather than to Dichter personally—because the conduct at issue was not private in nature but rather was officially authorized by the state. *See Herbage*, 747 F. Supp. at 67 (holding that individuals acting in their official capacities as agents of a foreign government are entitled to immunity "no matter how heinous the alleged illegalities"). As the Supreme Court held in finding that alleged police torture was "sovereign" rather than commercial activity, and thus protected by sovereign immunity:

> [H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long

[23] The concept of *jus cogens* is of relatively recent origin and remains unsettled. *See* International Law Commission Draft Articles on the Law of Treaties with Commentaries, Art. 50, cmt. 3 (1966) ("The emergence of rules having the character of *jus cogens* is comparatively recent. . . ."). The Vienna Convention on the Law of Treaties introduced the concept that treaties are invalid if they conflict with a *jus cogens* norm, which it defines as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." 1155 U.N.T.S. 331, Art. 53 (May 23, 1969) . Not only are the consequences of a norm qualifying as *jus cogens* unclear outside of the treaty context, *see, e.g.*, I OPPENHEIM'S INTERNATIONAL LAW 8 (Robert Jennings & Arthur Watts, eds.) (9th ed. 1992); Fox, *infra*, at 523-25, but controversy surrounds the question of which norms—if any—qualify as *jus cogens*. *See* Sean D. Murphy, PRINCIPLES OF INTERNATIONAL LAW 82 (2006); OPPENHEIM'S INTERNATIONAL LAW, *supra*, at 8.

> been understood for purposes of the restrictive theory as peculiarly sovereign in nature. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. Such acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.

Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993) (citations and internal quotation marks omitted). Certainly the same holds true for a foreign state's exercise of its military powers.

Further, any rule denying civil immunity to individual officials for alleged *jus cogens* violations would allow circumvention of the state's immunity for the same conduct. A foreign state's immunity is not subject to any general exception for *jus cogens* violations under the FSIA. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997); *accord Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994); *cf. Saudi Arabia*, *supra*. Indeed, while plaintiffs consider "extrajudicial killing" to be a *jus cogens* violation, the one exception of the FSIA encompassing such conduct is narrow in scope, aimed specifically at eliminating sovereign immunity as a defense to acts of state-sponsored terrorism. *See* 28 U.S.C. § 1605(a)(7). (fn. omitted). Were plaintiffs' position accepted, however, litigants could easily bypass these tight restraints by suing individual officials for alleged *jus cogens* violations without limitation. *See Doe I*, 400 F. Supp. 2d at 105 (rejecting *jus cogens* exception given that no such exception is found in the FSIA: "[E]ven assuming that the Israeli defendants have engaged in *jus cogens* violations, . . . *[j]us cogens* violations, without more, do not constitute an implied waiver of FSIA immunity.").

Not only would a *jus cogens* exception to official-act immunity be at odds with the FSIA, it would also be out of step with customary international law. No such exception is included in the UN Immunity Convention, having been specifically rejected for lack of support within the current international consensus. *See* Report of the International Law Commission to the General Assembly on the Work of Its Fifty-First Session, U.N. Doc. A/54/10 (1999),

at 171-72. Recently, the House of Lords likewise rejected such an exception in the *Jones* case, in which individual foreign officials were held to be immune from civil suit, notwithstanding that they were alleged to have engaged in torture. *See Jones*, UKHL 26, ¶¶ 12-35. As the court stated:

> [T]here is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory [*i.e.*, *jus cogens*] norms of international law, nor is there any consensus of judicial and learned opinion that they should. . . . But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.

Id. ¶ 27.

Plaintiffs' citation to the International Military Tribunal's rejection of an immunity defense in the Nuremburg trials, is off point for a number of reasons. This is a civil suit, in what, for the defendant, is a foreign court. The Nuremburg trials, by contrast, were criminal proceedings, which were, as a legal matter, under the authority of the defendants' own sovereign. In such different circumstances, immunity considerations can play out differently. As an initial matter, international law clearly distinguishes between the civil and criminal immunity of officials. On the civil side, officials are accorded immunity in part because states themselves are responsible for their officials' acts. On the criminal side, in contrast, international law holds individuals personally responsible for their international crimes, and does not recognize the concept of state criminal responsibility. *See Jones*, UKHL 26, ¶ 31; *see also id.* ¶ 19 (distinguishing criminal proceedings as "categorically different" for immunity purposes). Moreover, critically, there is the check of prosecutorial discretion in the criminal context: the Nuremburg proceedings were instituted by sovereign governments, and criminal prosecutions in this country are likewise controlled by the Executive branch. *See In re Grand Jury Proceedings*, 613 F.2d 501, 505 (5th Cir. 1980). Thus, while Congress has provided

limited authority for the criminal prosecution of war crimes in the federal courts, *see infra* at 45-46, any decision to bring such grave charges against a foreign official would be made by the Executive—and only after exceedingly careful consideration of the potential diplomatic consequences. By contrast, civil lawsuits like the one at bar are brought by private plaintiffs and consequently present an uncontrolled risk of interference with the Executive's conduct of foreign affairs. *Cf. Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").

Significantly, the lack of an immunity exception for civil suits alleging *jus cogens* violations does not mean that such violations, when they actually occur, will necessarily be beyond the reach of the courts. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign and can be waived by the sovereign. . . . Similarly, the circumstances of a case may create a question whether the conduct was performed on behalf of the state or was instead performed in the official's private capacity, in which case immunity would not attach in the first place. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) . . . *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). . . .

Moreover, even where sovereign immunity is validly invoked by a foreign official for an alleged *jus cogens* violation, and not waived in any manner by the parent government, remedies may still exist outside the civil setting. Beyond the possibility of criminal proceedings, the Executive may pursue sanctions or apply other forms of pressure in the diplomatic sphere. . . .

C. The TVPA Does Not Trump the Immunity of Foreign Officials for Their Official Acts

Finally, plaintiffs argue that, even if foreign officials are protected by immunity for their official acts, and even if the defendant's conduct was within his scope of authority, the TVPA trumps the defendant's claim to immunity. This argument, too, should be rejected.

Contrary to plaintiffs' contentions, . . . the TVPA is not unambiguous, but is instead silent as to whether its provisions take precedence over the immunity of a foreign official where that immunity is validly asserted. Given that the statute does not directly address the question, it should be read in harmony, rather than in conflict, with relevant immunity rules—as the Supreme Court has instructed in the parallel context of § 1983. *See Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).[26]

The TVPA's legislative history confirms that this was the intent of Congress. In addition to making clear that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity," H.R. Rep. 102-367(I), at 5 (1991), 1992 U.S.C.C.A.N. 84, 88 ("TVPA House Report"), the legislative history also indicates that the statute was intended to be compatible with the immunity an individual official might claim "by invoking the FSIA," S. Rep. 102-249, at 8 (1991) ("TVPA Senate Report"); *see also* TVPA House Report at 5, 1992 U.S.C.C.A.N. at 88 ("The TVPA is subject to restrictions in the [FSIA]."). Although it was believed that such immunity would typically be unavailable in a TVPA case (at least for former officials), this belief was based not on the idea that the TVPA would trump the individual defendant's immunity, but rather on the idea that the defendant would have difficulty establishing immunity in the first place because the state would

[26] The TVPA and § 1983 both apply, on their face, to official acts. *Compare* TVPA § 2, *codified at* 28 U.S.C. § 1350 note ("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall, in a civil action, be liable. . . .") *with* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable. . . .").

disown the conduct at issue. The Senate report offered the following explanation:

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. 1603(b) [FSIA's "agency or instrumentality" definition]. Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should *normally* provide no defense to an action taken under the TVPA against a former official.

TVPA Senate Report at 8 (emphasis added).

In essence, Congress expected that where an individual official is accused of conduct truly covered by the TVPA , foreign states would not normally assert that the conduct was within the scope of the official's authority. *See Kadic*, *supra*; *Filartiga*, *supra*. But the converse implication is that where, as here, there is no doubt that the official's conduct was performed on the state's behalf, Congress understood that the official could validly assert an immunity defense. Although the legislative history apparently followed *Chuidian* in tracing that immunity to the FSIA's "agency and instrumentality" definition, nothing suggests that Congress would have intended a different result if this immunity had correctly been traced back to common law instead. Rather, the thrust of the legislative history is that the statute was not intended to conflict with any form of immunity for foreign officials. *See Aristide*, 844 F. Supp. at 138-39 (holding that the TVPA "was not intended to trump diplomatic and head-of-state immunities," nor does it conflict with the FSIA since "the TVPA will only apply to state actors when they act in their individual capacity").

* * * *

B. HEAD OF STATE IMMUNITY

See discussions of head of state immunity in A.2. and C.3. *supra*.

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Immunity of Diplomatic Agent, Recognition by Receiving State: *United States v. Kuznetsov*

On July 24, 2006, the U.S. District Court for the Southern District of New York denied a motion to dismiss a criminal indictment against a Russian official based on an assertion of diplomatic immunity under the Vienna Convention on Diplomatic Relations and the UN Convention on Privileges and Immunities. *United States of America v. Kuznetsov*, 442 F. Supp. 2d 102 (S.D.N.Y. 2006). Vladimir Kuznetsov was charged with one count of conspiracy to commit money laundering.

Excerpts from the court's decision analyzing and rejecting his several asserted bases for immunity follow (most footnotes omitted).

---

* * * *

1. Diplomatic Agent

The Defendant claims that he is entitled to diplomatic immunity as a "diplomatic agent" under the Vienna Convention on Diplomatic Relations ("Vienna Convention").

Article 31 of the Vienna Convention provides that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." 23 U.S.T. 3227, art. 31(1). The United States has enacted a corresponding provision that states that "any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention of Diplomatic Relations . . . shall be dismissed." 22 U.S.C. § 254d. . . .

* * * *

. . . Article 4(1) of the Convention provides that "The sending State must make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State." 23 U.S.T. 3227, art. 4(1).

* * * *

A court's reliance on the State Department's certification when determining diplomatic immunity has a long history in this country's jurisprudence. In 1890, the Supreme Court stated that "the certificate of the Secretary of State . . . is the best evidence to prove the diplomatic character of a person." *In re Baiz*, 135 U.S. 403, 421, 10 S. Ct. 854, 34 L. Ed. 222 (1890). Courts have continued to find that recognition and certification by the State Department is necessary to establish diplomatic immunity. *See Carrera v. Carrera*, 84 U.S. App. D.C. 333, 174 F.2d 496 (D.C. Cir. 1949); *Abdulaziz v. Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984) (stating that "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status"); *United States v. Al-Hamdi*, 356 F.3d 564, 572 (4th Cir. 2004) (noting that "it appears that no reviewing court has ever held that the State Department's certification is anything but conclusive"). . . .

The Government has submitted a certification from the U.S. Department of State which states that in 1990, Defendant was notified and accepted by the State Department as a diplomatic member of the Permanent Mission of the Union of Soviet Socialist Republics ("USSR") to the United Nations in New York. Following the dissolution of the USSR, Defendant remained at the Permanent Mission of the Russian Federation to the United Nations. . . . On March 18, 1996, the United Nations notified the United States that Defendant was terminated as a diplomatic member of the Permanent Mission of the Russian Federation on February 9, 1996. In September, 2002, Defendant was notified to the United States by the United Nations Secretariat in New York as a member of the Advisory Committee on Administrative and Budgetary Questions; the United States was notified of Defendant's December 31, 2005 termination from that position, in February, 2006. The State Department has no record that the Russian Federation ever notified Defendant as a "member of its bilateral mission (embassy) or any consulate in the United States."

Defendant has not furnished the Court with any proof that the State Department accredited him as a member of any mission. Defendant's arguments [concerning] his participation in the Russian MFA and the Geneva Group fail to overcome this fatal deficiency. The Court notes that although the Russian Mission

states in their letters to the Court that Defendant is a "Russian career diplomatic agent" and hence, entitled to full diplomatic immunity, the Russian government failed to follow any of the procedures required to notify the U.S. government of Defendant's diplomatic status, although it had followed such procedures in 1990 when Defendant was a diplomatic member of the Permanent Mission of the USSR, and then of the Russian Federation. . . . In fact, it was the United Nations that sponsored Defendant's application for a visa, and provided notification to the State Department of Defendant's employ at ACABQ. (Id. at Exs. G and I.) In addition, the Russian Mission has stated that Defendant was "on leave without pay" since he was elected as Chairman of ACABQ. . . . Defendant could not have been both "on leave and without pay" and representing the Russian Federation while he was Chairman of ACABQ, especially since the Chairman of ACABQ must declare that he will not "seek or accept instructions in regard to the performance of [his] duties from any Government or other source external to the [United Nations]." . . . Accordingly, the Court finds that Defendant has not established that he is entitled to immunity under the Vienna Convention as a diplomatic agent.

2. Visiting Foreign Official

Article VI, Section 11 of the United Nations Convention on Privileges and Immunities ("United Nations Convention") provides that:

> Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, while exercising their functions and during their journey to and from the place of meeting, enjoy . . . immunity from personal arrest or detention [and] such other privileges, immunities, and facilities not inconsistent with [this Section] as diplomatic envoys enjoy.

21 U.S.T. 1418, art. IV, §§ 11(a), (g).

Defendant argues that, independent of his status as a diplomatic agent pursuant to his position with the Russian MFA, as Chairperson

of the ACABQ, he is entitled to full diplomatic immunity under the United Nations Convention. . . . Defendant contends that his status as a visiting foreign official is further supported by the issuance of a diplomatic visa in connection with his position on the ACABQ. In his reply, Defendant also states that his participation in the Geneva Group conference is a separate basis for his entitlement to full diplomatic immunity under the United Nations Convention.

a. The ACABQ

The Advisory Committee on Administrative and Budgetary Questions ("ACABQ") was established by the General Assembly "[t]o facilitate the consideration of administrative and budgetary questions by the General Assembly and its Administrative and Budgetary Committee." G.A. Res. 14(1), P A(2), U.N. Doc. 14(1) (Feb. 1, 1946). . . .

* * * *

A review of UN documents support[s] the Government's position that Defendant was not a "visiting foreign official," entitled to diplomatic immunity under the United Nations Convention. Indeed, it is clear from those documents that Defendant was working for the ACABQ in his individual capacity and was considered by the UN to be a full-time employee of the UN. As an employee of the ACABQ, the Defendant had only functional and diplomatic immunity as a UN official which was subsequently waived by the Secretary General.[6]

[6] General Assembly Resolution 3188 (XXVII) grants the Chairman of ACABQ immunity under Article V and VII of the UN General Convention on Privileges and Immunities. G.A. Res. 3199 (XXVII) (Dec. 18, 1973). Article V, § 18 provides immunity from "all acts performed by [Officials] within their official capacity." 21 U.S.T. 1418, Art. V, § 18 (Apr. 29, 1970). In addition, Section 19 extends full diplomatic immunity to the Secretary General and all Assistant-Secretaries General. 21 U.S.T. 1418, Art. V, § 19. As "[p]rivileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves," the Secretary General is authorized to "waive the immunity of any official in any case where immunity would impede the course of justice." 21 U.S.T. 1418, Art. V, § 20.

* * * *

This conclusion is not affected by the fact that Defendant was issued a "G-2" visa. Defendant argues that the issuance of his "G-2" diplomatic visa by the State Department evidences that he was notified to, and accepted by, the United States as a foreign representative with diplomatic immunity. He contends that the issuance of the "G-2" is proof, in and of itself, that the State Department accorded him diplomatic status and corresponding immunity.

The "G-2" visa is issued to visiting representatives of a foreign government to an international organization, of which the foreign government is a member. See 8 U.S.C. § 1101(a)(15)(G)(ii).

The Second Circuit has stated that a visa "does not necessarily confer diplomatic immunity." *United States v. Kostadinov*, 734 F.2d 905, 912 (2d Cir. 1984) (finding that the issuance of an A-1 visa did not confer diplomatic immunity since such status is only recognized by the issuance of a diplomatic immunity card and identification on official lists prepared by the U.S. government); *see also El-Jassem v. United States*, 1996 U.S. App. LEXIS 30725, No. 95-1345, 1996 WL 680958, at *1 (2d Cir. Nov. 25, 1996); *United States v. Al-Hamdi*, 356 F.3d 564 at 573.

As is abundantly clear from UN reports, resolutions and regulations, Defendant was not part of ACABQ as a Russian representative, but served on ACABQ in his individual capacity. In addition, the visa issued to Defendant makes no mention of the Russian Ministry of Foreign Affairs, or the Geneva Group. Under "Annotations" the visa reads "ACABQ Chairman, United Nations, New York." . . .

Hence, the issuance of a diplomatic visa is not conclusive "evidence that the Government recognizes the defendant as a visiting foreign official who is entitled to full diplomatic immunity under the United Nations Convention."[8] . . .

* * * *

[8] Moreover, as previously noted, the State Department was not notified by the Russian Federation of Defendant's alleged status as a diplomat or a visiting foreign official.

2. Immunity of Diplomatic Properties

As discussed in A.1.d.(3) *supra,* the U.S. Court of Appeals for the District of Columbia Circuit vacated a district court order denying a motion to quash an execution order against two Washington, D.C. dwellings owned by the Democratic Republic of Congo ("DRC") and remanded the case to the district court for a determination on the merits of the DRC's claims of immunity. *FG Hemisphere Associates, LLC v. Democratic Republic of Congo,* 447 F.3d 835 (D.C.Cir. 2006). The United States had filed a brief as *amicus curiae* on December 5, 2005. Among other things, it addressed DRC claims of diplomatic immunity, as excerpted below. The full text of the brief is available at *www.state.gov/s/l/c8183.htm.*

Immunity of the properties from execution under the Vienna Convention [on Diplomatic Relations] provides an independent ground for quashing the writs of execution issued by the district court. See 28 U.S.C. 1609 (FSIA execution provisions incorporate pre-existing treaty rights).

The Vienna Convention states that "the premises of the mission shall be inviolable" (Art. 22(1)), and expressly provides that those premises are immune from execution (Art. 22(3)). As we have noted, both properties at issue here supported the DRC's diplomatic mission to the United States. The properties retain the tax exemptions obtained for them by the State Department from the District of Columbia, and they continue to be listed in the State Department's records as diplomatic residences.

The State Department has been well aware of the situation involving occupation of these properties by holdovers. See, e.g., Doc. 42, Exhibit 7, Appendix I (diplomatic note from DRC to State Department requesting assistance in protecting former ambassadorial residence). Indeed, over the years, the State Department has assisted the DRC in understanding how to resolve the matter.

The Vienna Convention is an agreement between nations to regulate diplomatic relations. It does not explicitly address when the diplomatic status of mission properties commences or

concludes,[3] but rather leaves this judgment to the parties. In the United States, the State Department administers the Convention, accrediting foreign diplomatic personnel and determining the "members of the mission" and the "staff of the mission." Vienna Convention, Art. 1(b), (c). Similarly, the State Department determines which properties qualify for the protections of the "premises of the mission." Id. at Art. 1(i).

In the Foreign Missions Act ("FMA"), 22 U.S.C. 4301 et seq., Congress assigned to the State Department the central role in carrying out United States policy "to support the secure and efficient operation" of both American missions abroad and foreign missions in this country. See 22 U.S.C. 4301(b). That statute expressly charges the State Department with responsibility for managing the reciprocal relationship between the treatment of our own missions abroad and foreign missions here. 22 U.S.C. 4301(c). Thus, the State Department regulates foreign mission acquisition of real property, 22 U.S.C. 4305, and "[a]ssist[s] agencies of federal, State and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled," 22 U.S.C. 4303(1).[4]

In determining whether the property of a foreign state is "used for mission purposes" and thus constitutes part of the "premises of the mission" (Vienna Convention, Art. 1(i)), the State Department

---

[3] In contrast, Article 39 of the Convention provides specific temporal boundaries for an individual's privileges and immunities. See Vienna Convention, Art. 39(2) ("When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict."; see also id. at Art. 39(1) & (3). Even in this area, however, where the treaty provides greater clarity, "[c]ourts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984) (citing *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949)).

[4] Pursuant to its treaty and statutory obligations, the State Department has adopted procedures under which foreign nations submit requests for tax exemption to the State Department, which in turn submits such requests to the state or local taxing authority.

generally consults with a foreign state regarding its intended use of a property, and on that basis seeks tax exempt status from local authorities. In this instance, the DRC used the properties as diplomatic residences for many years, but that use was frustrated in recent years by the holdovers. The DRC has never abandoned its original objective, and has made efforts to regain possession and actual use of the properties. For this reason, the State Department continues to view the properties as diplomatic, and therefore inviolable and immune from execution (Vienna Convention, Art. 22(2) & (3)).

FG argued below that this Court can decide the status of the properties, without regard to the State Department's position, on the basis of their use at the time the writs of execution were issued. There are many reasons, however, why a property might not be used at a particular moment as a diplomatic residence. For example, Iran's embassy and ambassadorial and other diplomatic residences have not been used to house the mission offices or diplomats since the hostage crisis. Yet, courts have rejected efforts to execute against those properties, ruling that they remain in diplomatic use. *See, e.g., Hegna v. Islamic Republic of Iran*, 287 F. Supp. 2d 608, 609-10 (D. Md. 2003) *aff'd on other grounds*, 376 F.3d 226 (4th Cir. 2004) (Iranian diplomatic residences that had been blocked by the United States remained subject to the Vienna Convention). There are other circumstances as well, in the United States and abroad, that can and do result in a nation's failure to use its mission premises for a period of time. These may include renovations, an unfilled diplomatic post, disputes with holdovers, or disputes in which the receiving state does not allow the sale of properties that the sending state no longer uses for diplomatic purposes.

The State Department can best assess the foreign policy impact of withdrawing diplomatic status from property still claimed as such by a foreign state. Although done infrequently, the State Department has taken such action—but only when it has concluded, after multiple warnings, that the foreign state appears to have no intention to restore the property to active use for diplomatic purposes. This caution stems from acute awareness of the damaging impact that withdrawal of diplomatic status is likely to have on relations with the foreign state in question, on the foreign

mission community generally, and on the treatment of United States missions abroad.

In light of the State Department's expertise regarding privileges and immunities of foreign states, and its particular statutory mandate with regard to diplomatic property, this Court should be especially reluctant to override the State Department's determination. Courts have consistently recognized the deference owed to Executive agencies in the interpretation of treaties that they negotiate and subsequently administer. *See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Air Canada v. Department of Transp.*, 843 F.2d 1483, 1486 (D.C. Cir. 1988) (when operative terms of treaty "have some play," reviewing court "owes substantial deference to the interpretation given by the administering agency to matters within its competence"); see also U.S. CONST. art. II, § 3, cl.3 (granting President power to "receive Ambassadors").

In litigation concerning taxation immunity, courts have recognized the State Department's unique and weighty role in determining the status of diplomatic and consular property. *See United States v. Arlington County*, 669 F.2d 925, 934 (4th Cir. 1982) (State Department's view that particular diplomatic residences are used for maintaining a diplomatic mission, though not conclusive, is entitled to great weight, and should be rejected only if "manifestly unreasonable"); *United States v. Arlington County*, 702 F.2d 485, 488 (4th Cir. 1983) (State Department's position regarding tax exempt status of residence is "the weight which tips the scales"); *United States v. City of Glen Cove*, 322 F. Supp. 149, 153-54 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971) (State Department's certificate regarding use of diplomatic properties is at least prima facie evidence, if not conclusive).

Such deference is particularly appropriate here. The Vienna Convention does not provide clear guidance regarding the circumstances in which the status of particular property as part of the premises of a foreign mission may be terminated. The State Department, which has responsibility for carrying out the United

States' treaty obligation to protect the inviolability of such premises, has determined that the properties at issue here remain part of the premises of the DRC's mission to the United States. As such, the premises are immune from execution under the Vienna Convention (Art. 22(3)), and, pursuant to the FSIA's incorporation of pre-existing treaty rights (28 U.S.C. 1609), likewise immune under that statute.

3. Immunity of Members of Special (Ad Hoc) and Permanent Diplomatic Missions

On July 24, 2006, the United States, responding to a request from the District Court for the District of Columbia, filed a Suggestion of Immunity and Statement of Interest of the United States asserting the immunity of the sitting Minister of Commerce of the People's Republic of China ("PRC" or "China") while in the United States at the invitation of the executive branch to participate in an annual meeting of the U.S.-China Joint Commission on Commerce and Trade ("JCCT"). *Li Weixum v. Bo Xilai*, Civ. No. 04-0649 (RJL) (D.D.C.). The United States urged dismissal of the suit on the ground that Minister Bo was immune from service for the duration of his diplomatic mission, and service had been effected during that period. Plaintiffs in the case, practitioners of the Falun Gong spiritual movement in the PRC sued Bo Xilai ("Minister Bo") under the Alien Tort Statue ("ATS") and the Torture Victim Protection Act ("TVPA") for actions he allegedly took in furtherance of China's policy of suppressing the Falun Gong while serving in a previous government position.

A letter from John B. Bellinger, III, Legal Adviser of the Department of State, attached to the Statement of Interest as Attachment 1, stated that the Department of State "recognizes and allows the immunity of Minister Bo Xilai." Excerpts from Mr. Bellinger's letter explain the basis for Minister Bo's immunity as a high-level official on a special diplomatic mission. The full text of the letter, with attachments, including diplomatic

correspondence from officials of the PRC, is available at *www.state.gov/s/l/c8183.htm*.

* * * *

Background

The plaintiffs allege that China's Minister of Commerce Bo Xilai planned and carried out serious human rights abuses against practitioners of the Falun Gong spiritual movement (FLG) in Liaoning Province. All plaintiffs appear to be Chinese nationals who reside in the People's Republic of China or in countries other than the United States. They assert that Minister Bo, acting "under color of law" in his former position as Governor of Liaoning, is responsible for these violations. All of the acts alleged in the complaint are said to have occurred within China at the direction of the Chinese government, against Chinese nationals. We are unaware of any connection between the underlying suit and the United States.

As Minister of Commerce, Bo Xilai is now responsible for China's commerce and international trade, including international trade policy and negotiation. The attempt to serve process on Minister Bo was made at a time when he was Minister of Commerce (no longer Governor of Liaoning Province) and while he was on official diplomatic travel to the United States as an active member of the delegation of Chinese Vice Premier Wu Yi to the U.S.-China Joint Commission on Commerce and Trade (JCCT)—a bilateral, governmental consultative forum that addresses significant bilateral trade concerns and promotes commercial opportunities between the United States and China. We understand from the Government of China that the summons and complaint were physically thrust upon Minister Bo while he was attending a U.S.-China Business Council reception in honor of Vice Premier Wu Yi and her delegation (see Enclosure B).

Without reference to the specific allegations in this suit, the Department of State has informed China, both publicly and privately, of its strong opposition to violations of the basic human rights of FLG practitioners in China. We have repeatedly called on China to respect the rights of all its citizens, including FLG adherents. The Department of State's critical views of China's

treatment of the FLG practitioners are a matter of public record. *See, e.g., Department of State Annual Human Rights Report for 2005, www.state.gov/g/drl/rls/hrrpt/2005/61065.htm* (especially pages 22-23).

Discussion

Although we oppose the Chinese government's anti-FLG policies, we believe that this suit should be dismissed. For U.S. courts to exercise jurisdiction over Minister Bo in the circumstances of this case would be inconsistent with international law and expectations relating to the immunities of states and their official representatives and would seriously interfere with the United States' ability to conduct foreign relations.

Moreover, it will undercut the U.S. government's efforts to engage China on human rights issues, including its treatment of the FLG. It could also adversely affect U.S. engagement with China on a broad range of other issues, including counter-terrorism, law enforcement, economics and trade, trafficking in persons, adoption, narcotics suppression, and nuclear nonproliferation. Indeed, the instant lawsuit has already had a chilling effect on U.S.-China relations; I enclose a series of diplomatic notes and letters that China has sent the United States expressing its deep concern about it (Enclosures B - D).

1. The Department of State regards the April 2004 visit of Minister Bo to have been a special diplomatic mission and considers Minister Bo to have been an official diplomatic envoy while present in the United States on that special mission. Consistent with the rules of customary international law recognized and applied in the United States and in furtherance of the President's authority under Article II of the Constitution, it is appropriate to recognize the immunity of a high-level official on a special diplomatic mission from the jurisdiction of United States federal and state courts in a case such as this. In light of these considerations, the Department recognizes and allows the immunity of Minister Bo Xilai from the jurisdiction of the United States District Court, including from service of process, during the period of his visit to the United States.

The practical wisdom underlying this immunity is apparent. Diplomatic relations often turn on the ability of officials from different states to communicate and meet with each other without harassment or distraction. Indeed, the need for unhampered communication between governments is often most critical when the disagreements between them are the greatest. If suits of this kind can be commenced in U.S. courts against a senior foreign government official present in the United States for government-to-government business, the President will be deprived of an essential foreign policy tool and our ability to pursue our foreign policy objectives effectively will be significantly undermined. The United States must be able to host foreign officials without the prospect that they may be served with process in a civil suit.

Permitting suits like this would also be inconsistent with U.S. views on the assertion of jurisdiction over U.S. government officials by foreign governments and courts. The United States has made clear to foreign governments that it objects to service of process on senior U.S. officials traveling overseas; we have insisted, for example, that requests for documents and information about official acts of U.S. representatives for use in criminal investigations should be made government-to-government through diplomatic or law enforcement channels, not by attempting to serve or obtain jurisdiction over the officials themselves, particularly when they are on temporary visits. Permitting this suit against Minister Bo would be inconsistent with our representations to other governments, and could expose U.S. officials visiting other countries to suits arising from their performance of official U.S. government functions.

2. The attempted assertion of jurisdiction over Minister Bo while he was in the United States on official, bilateral business at the invitation of the United States has had immediate adverse foreign policy consequences and has directly interfered with the President's authority to conduct foreign relations, including his authority to receive "Ambassadors and other public ministers" (U.S. Const. Art. II, Section 3). The Executive originally invited Vice Premier Wa Yi to head a delegation to the United States for bilateral consultations in an effort to further U.S.-China trade relations. The attempt to serve Minister Bo while he was here on that

delegation undercut that effort and elicited strong objections from China, which characterized the purported service as an assault and questioned the good faith of the United States in hosting the visit. Indeed, China's Legal Adviser has made clear to me that, because of this litigation, he has recommended that Minster Bo not travel to the United States unless his immunities from jurisdiction will be respected.

3. The foreign policy problems created by this case are exacerbated by the fact that it is, in effect, a suit against China about acts taken in China against Chinese nationals. Any lawsuit that challenges the policies and actions of foreign authorities in their own territory concerning their own citizens has an inherent potential to cause friction in foreign relations. A review of the complaint in this case makes clear its ambition to challenge not only acts attributed to Minister Bo, but also the Chinese Government's anti-FLG policy, in general. (See, for example, Compl. ¶ 1, alleging that Minister Bo's actions were taken "in concert with other officials at the highest levels of the national government of the People's Republic of China (PRC) and its ruling Central Committee of the Chinese Communist Party.") The fact that the lawsuit is effectively directed against the Chinese Government and its official policies is confirmed when it is seen in the context of the large number of suits the FLG have initiated against high-level Chinese officials in the United States and other countries. The FLG website (flgjustice.org) lists over sixty actions against Chinese entities and officials. Lawsuits have been filed in South America, Africa, Asia and Europe (in over ten different European countries), in addition to Canada, where multiple suits have been filed, and the United States, where the website reports fifteen suits.

In view of the Department of State's recognition of Minister Bo's immunity from the Court's jurisdiction and the significant adverse foreign policy implications of the further conduct of this suit, the Department of State asks that you submit to the Court an appropriate Suggestion of Immunity and Statement of Interest to obtain the prompt dismissal of the proceedings against Minister Bo.

The July 24, 2006, U.S. Statement of Interest and Suggestion of Immunity to which Mr. Bellinger's letter was attached, addressed in greater detail the bases for Minister Bo's

immunity and its binding effect on the court. The U.S. submission also briefly addressed issues related to the FSIA and act of state doctrine raised in the letter from the court, stating that "[g]iven that this case can and should be dismissed pursuant to the Suggestion of Immunity—and, in any event, on foreign policy grounds—the FSIA and act of state issues raised in the Court's Letter need not be addressed. Both issues pose difficult and sensitive questions that need not be confronted at this time in the present circumstances of this case."

On December 6, 2006, after plaintiffs had responded to its July 2006 filing, the United States filed a Further Statement of Interest in Support of the United States' Suggestion of Immunity. Excerpts follow from each of the submissions, as indicated (most footnotes and references to other pleadings omitted). Quotations from Mr. Bellinger's letter, set forth above, have been largely omitted from these submissions. Both U.S. submissions are available in full at *www.state.gov/s/l/c8183.htm*.

July 24, 2006 U.S. Statement of Interest and Suggestion of Immunity

ARGUMENT

I. Minister Bo Is Immune Because The Department Of State Has Determined That He Was On A Special Diplomatic Mission When Service Was Attempted.

* * * *

From the earliest days of the Republic, the United States has recognized that senior foreign officials invited to the United States are entitled to certain fundamental legal protections that permit them to carry out their official functions. In the words of the Supreme Court,

> A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive

> him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

The Schooner Exchange v. McFaddon, 11 U.S. 116, 139 (1812). This principle is not only consistent with rules of customary international law recognized and applied in the United States but also with the President's constitutional powers over foreign affairs.[2] In addition, Article II, Section 3 of the Constitution, which expressly grants the President the authority to "receive Ambassadors and other public Ministers," provides the Executive Branch with the authority to define the terms for receiving foreign emissaries. *See United States v. Benner*; 24 F. Cas. 1084 1086 (C.C.E.D. Penn. 1830) ("the power of receiving ambassadors and other public ministers is plenary and supreme, with which no other department of the government can interfere. . . . In the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States attach to the diplomatic character"). Therefore, upon an Executive Branch determination, senior foreign officials on special diplomatic missions are immune from personal jurisdiction where jurisdiction is based solely on their presence in the United States during their mission. In the present case, the Legal Adviser has informed the Department of

[2] The Supreme Court has also expressly recognized—for purposes of the conferral of citizenship on children born in the United States—that ministers of foreign sovereigns are not subject to the jurisdiction of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) ("[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns *or their ministers,* or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory. . . .") (emphasis added).

Justice that "the Department of State recognizes and allows the immunity of Minister Bo Xilai from the jurisdiction of the United States District Court, including from service of process, during the period of his visit to the United States." *See* Bellinger Letter at 2. For this reason, the purported service of process on Minister Bo during his presence in the United States on a special diplomatic mission should be deemed a nullity, and the case should be dismissed for lack of jurisdiction over Minister Bo.

Consistent with the Constitution's allocation of primary responsibility for foreign affairs to the Executive Branch, Supreme Court precedent clearly establishes that U.S. courts are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Peru*, 318 U.S. 578, 588-89 (1943). In *Ex parte Peru*, the Supreme Court declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that the courts' retention of jurisdiction would jeopardize the conduct of foreign relations. *Ex parte Peru*, 318 U.S. at 589. *See also Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974) ("[O]nce the State Department has concluded that immunity is warranted, and has submitted that ruling to the court through a suggestion, the matter is for diplomatic rather than judicial resolution"); *In re Baiz*, 135 U.S. 403,432 (1890) (in the foreign minister context, suggesting that a court must accept a certification of the Department of State that a person is the foreign minister and entitled to immunity). Accordingly, where, as here, the Executive Branch has recognized the immunity of a high-level foreign official on a special diplomatic mission and the Executive Branch has filed a suggestion of immunity, it is the "court's duty" to surrender jurisdiction. *Ex parte Peru*, 318 U.S. at 588; *see also Hoffman*, 24 U.S. at 35.

The courts of the United States have consistently heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch. Prior to 1977, when the Foreign Sovereign Immunities Act ("FSIA") was enacted, such suggestions were made primarily on behalf of foreign states; because FSIA comprehensively regulates the immunity

of foreign states, suggestions have since been made primarily on behalf of foreign heads of state, and in some cases other officials.[5] The obligation to heed Executive Branch suggestions also applies, however, to special diplomatic missions. *See Kilroy v. Charles Windsor, Prince of Wales*, Civ. No. C-78-291 (N.D. Ohio, 1978) (Prince of Wales), Attachments 2 (decision) and 3 (United States' suggestion), attached hereto; *Chong Boon Kim v. Yim Yong Shik*, Civ. No. 12565 (Cir. Ct. 1st Dir. Haw. 1963), *cited at* 58 AM J. Int'l Law 165, 186-87 (1964) (Philippine Solicitor General), *see* Attachment 4, hereto; *see also Republic of the Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987) (court granted Philippine Solicitor General diplomatic immunity, misunderstanding U.S. position that he was entitled to special missions immunity). While suits against ministerial level foreign officials initiated through service while the minister is in the United States on official business have been exceedingly rare, the United States has submitted suggestions of immunity in previous cases involving efforts to initiate suits by attempting to physically serve foreign heads of state or senior foreign representatives while they were in the United States temporarily on official visits. *See. e.g.,Tachiona v. Mugabe,* 234 F. Supp. 2d 401 (S.D.N.Y. 2004) (head of state and foreign minister), *aff'd on other grounds,* 386 F.3d 205 (2d Cir. 2004); *Plaintiffs A, B C v. Zemin*, 282 F. Supp. 875 (N.D. I1. 2003) (head of state); *Chong Boon Kim*, Civ. No. 12565 (Cir. Ct. 1st Dir. Haw. 1963), Attachment 4 (special mission by foreign minister where he had been allegedly served while in the United States). The United States also submitted a suggestion of special mission immunity when the Philippine Solicitor General was given a subpoena for purposes of discovery in on-going litigation. *See Republic of the Philippines*, 665 F. Supp. at 793. Here, the determination of this immunity rendered Minister Bo immune from service of process for the duration of the special diplomatic mission, which renders the service in this action a legal nullity.

Judicial deference to the Executive Branch's suggestions of immunity advances important constitutional principles. As the

[5] Indeed, the head of state cases unanimously recognize that suggestions of immunity are conclusive in those cases. . . . The immunity suggested here is consistent with head of state immunity.

Fifth Circuit explained in *Spacil*, "[s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." 489 F.2d at 619 (citing *United States v. Lee*, 106 U.S. 196, 209 (1882)); *see also Ex parte Peru*, 318 U.S. at 588. The Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. *See Spacil*, 489 U.S. at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. *Id.* And, "[p]erhaps most importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

These considerations are well evidenced in the case at hand. As explained further below, the Executive Branch's ability to conduct foreign affairs would be seriously undermined were this lawsuit not dismissed. *See infra* at Part II. In addition, the authority to suggest special mission immunity allows the Executive Branch to respect and contribute to customary international law, while avoiding the prospect of objections by other states.[6] Other states have recognized special mission immunity and its foundation in international law.[7] The full extent of that immunity may remain unsettled,

---

[6] Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33 (1964) ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.").

[7] In 1984, for instance, the Criminal Chamber of the German Federal Supreme Court opined that "irrespective of the [UN Special Missions Convention], there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an *ad hoc* envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law." Decision of February 27, 1984, *(Tabatabai)* Case No. 4 StR 396/83, 80 ILR 388 (1989). The applicability of this principle has also been recognized even with respect to the gravest allegations. For example, the

10-Cummins-Chap10.indd 671 10/22/07 11:43:21 PM

but need not be decided here in any event. Minister Bo's case falls well within the widespread consensus that, at a minimum, States are constrained in their ability to exercise jurisdiction, as here, over ministerial-level officials invited on a special diplomatic mission. It is notable that a British court recently recognized Minister Bo's special mission immunity in refusing to issue a criminal arrest warrant against him in the United Kingdom. *See Re Bo Xilai*, Bow Street Magistrates Court (unreported decision), November 8, 2005, attached hereto at Attachment 7. *See* Restatement (Third) of Foreign Relations Law of the United States, § 464, cmt. i ("High officials of a foreign state and their staffs on an official visit or in transit, enjoy immunities like those of diplomatic agents when the effect of exercising jurisdiction against the official would be to violate the immunity of the foreign state.").[9] In the few earlier U.S. cases presenting comparable circumstances, foreign governments have objected vigorously, and the United States has in fact suggested immunity. *See, e.g., Republic of Philippines*, 655 F. Supp. at 793.

Guided by these precedents, the Court should accept the United States' Suggestion of Immunity for Minister Bo, conclude that for the duration of the special diplomatic mission that Minister Bo

---

Belgian Government, which asserted (unsuccessfully) the right to issue a warrant for the arrest of the foreign minister of the Democratic Republic of the Congo, emphasized to the International Court of Justice, without limitation to foreign ministers, that it was not claiming a right to enforce such warrants against "representatives of foreign States who visit Belgium on the basis of an official invitation." *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of The Congo v. Belgium), Counter Memorial of the Kingdom of Belgium, September 28, 2001, para. 1.212, *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobepleadings/icobe_ipleading_countermemorial_belgium_20010928.pdf. *See also id*. Judgment of February 14, 2002, http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

[9] Special mission immunity would not, however, encompass all foreign official travel. For example, no personal immunity is extended to persons based on their mere assignment to temporary duty at a foreign mission for a brief period of time. *See. e.g.,* Department of State circular diplomatic note, dated May 1, 1985, published in M. Nash, Cumulative Digest of United States Practice in International Law 1981-1988, 905, 907 (1993).

was immune from service of process, and dismiss the case against him for lack of jurisdiction.

II. Foreign Policy Considerations Also Warrant Dismissal Of This Action.

. . . . Even if the United States' Suggestion of Immunity did not compel dismissal, however, the United States would urge the Court to dismiss this lawsuit given the Department of State's concern in avoiding significant tensions in U.S. relations with China as well as judicial intrusion into matters constitutionally committed to the Executive Branch.

* * * *

Apart from the manner of service, this case has caused friction between the United States and China because Plaintiffs seek to have this Court pass judgment on Chinese government policies. Bellinger Letter at 3-4. In *Sosa* [v. *Alvarez Machain,* 542 U.S. 692 (2004)], the Supreme Court recognized that the potential for adverse foreign policy effects will be especially great where U.S. courts are asked to sit in judgment of the conduct of foreign officials abroad. 542 U.S. at 733, n.21. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Id*. at 727.

This suit manifestly concerns actions allegedly taken against Chinese nationals and residents by Chinese officials carrying out Chinese government policies in China. . . .

Indeed, the PRC has protested the continued adjudication of this suit in very strong terms. *See* Diplomatic Correspondence attached to Bellinger Letter at Enclosures B-D. Most recently, in a letter to Attorney General Gonzales concerning this case, PRC Minister of Justice Wu Aiying has stated: "The US side should be fully aware that China-US relations, especially the economic and trade ties as well as cooperation between the relevant government departments and exchange of visits, will be adversely affected. . . ." *See* Aiying Letter, attached hereto as Attachment 8, at 1. It is clear

that adjudication of this suit will cause significant friction in U.S. relations with China. This, in turn, will interfere with Executive Branch efforts to work with China on a range of issues important to United States interests, including efforts aimed at improving the treatment of the Falun Gong in China.

Permitting this case to go forward would also offend core constitutional principles underlying the political question doctrine as expounded by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962). While the Supreme Court has cautioned that not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *id.* at 211, adjudication of this case implicates several of the *Baker* factors. Adjudication would show a lack of the respect due coordinate branches of government," require the Court to interfere in areas as to which there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and ["]an [unusual need for unquestioning] adherence to a political decision already made,["] *id*, at 217,—namely, the decision to invite Minister Bo to the United States for official talks. Adjudication of this case, moreover, would create the potential of embarrassment from conflicting pronouncements by various departments on one question. *Id.* The decision to invite Minister Bo to the United States for official talks was a quintessential foreign policy decision of the sort constitutionally reserved to the Executive Branch. Article II, Section 3 of the Constitution assigns to the President the authority to "receive Ambassadors and other public Ministers."[11] Courts have long construed this executive authority to encompass a near-exclusive power to dictate the terms upon which foreign diplomats are received in this country." *Tachiona v. United States*, 386 F.3d 205,213 (2d Cir. 2004) (citing cases); *see also Benner*, 24 Cas. at 1086.

* * * *

[11] Minister Bo would fall within the terms of this constitutional provision. *See* 7 0p. Atty. Gen. 186, 204 (1855) ("Ambassadors and other Public Ministers" includes "all possible diplomatic agents which any foreign power may accredit to the United States" and "all officers having diplomatic functions whatever their title or designation.").

Further U.S. Statement of Interest and Suggestion of Immunity (December 6, 2006)

* * * *

I. Special Missions Immunity Is Recognized In Customary International Law And Is Distinct From The Immunity Enjoyed By Members Of Permanent Diplomatic Missions Under The Vienna Convention On Diplomatic Relations.

The United States' initial filing demonstrated that special missions immunity is recognized in customary international law and under domestic law through the practice of the Executive Branch in particular cases. In Sections II A-C of their response, plaintiffs' fundamental contention is that the Court should give no weight to the United States' immunity determination because only members of the permanent diplomatic missions of foreign States are eligible for immunity under the Vienna Convention on Diplomatic Relations (VCDR). Therefore, they argue, high level representatives of foreign States on special diplomatic missions to the United States should be regarded as having no immunities at all, as a matter of both United States and international law. This argument is wrong and ignores both the history surrounding modern immunities and the Executive Branch's continuing authority to extend immunity to visiting foreign officials to further the interests of the United States.

* * * *

Shortly after the Second World War and the founding of the United Nations, the United Nations General Assembly asked the International Law Commission (ILC) and the Sixth Committee of the General Assembly (Sixth Committee) to examine the customary international law governing the privileges and immunities of permanent as well as special diplomatic missions and to attempt to reduce those roles to widely acceptable written form. *See generally* International Law Commission, Origins and Background & Organization, Programme and Methods of Work, http://untreaty.un.org/ilc/ilcintro.htm#origin (last visited Dec. 5, 2006). Ultimately, these various privileges and immunities were addressed

through separate conventions. The result was that, after years of preparation, a set of rules to govern the diplomatic staff of permanent missions was eventually proposed in the 1961 VCDR, and another set, to govern special diplomatic missions, was proposed in the 1969 UN Convention on Special Missions, G.A. Res. 2530, 24 UN GAOR Supp. No. 30, at 99 (1969).

* * * *

Because States may not find themselves in unanimous agreement on some progressive principles incorporated into a convention, the inclusion of such concepts can sometimes explain why a particular convention does not become widely recognized. But in such cases, the decision not to adopt a convention does not imply that no customary international law governs state conduct in a particular area as the plaintiffs appear to argue. Rather, nonparticipating States continue to rely on customary international law instead of the convention to govern their conduct in that area and may in fact further the development of customary international law through their collective practice. *See generally*, Restatement (Third) of Foreign Relations, Introductory Note to Chapter One, §§ 101-103, and related comments.

Differing reactions of the states have affected the histories of the VCDR and the Convention on Special Missions. The VCDR, for example, won widespread acceptance and was ultimately ratified by the United States and, to date, some 186 other States, with many of the remaining States accepting the bulk of its provisions as an accurate expression of customary international law.[4] The Convention on Special Missions, by contrast, has only 22 States as parties. Its failure to attract wider adherence is generally understood to reflect, at least in part, a view on the part of many states that the Convention properly codified the concept of special missions immunity in some respects but not in others. *See generally*, Decision of February 27, 1984, (Tabatabai) Case No. 4 StR 396/83,

[4] The Diplomatic Relations Act, for instance, provides: "With respect to a nonparty to the [VCDR], the mission, the members of the mission, their families, and diplomatic couriers shall enjoy the privileges and immunities specified in the [VCDR]." 22 U.S.C. § 254b.

80 Int'l L. Rep. 388 (1989); Malcolm N. Shaw, International Law 538-39 (Grotius, 4th ed. 1997). This is entirely consistent with the fact that, in practice, the United States has suggested special missions immunity in some cases, but has not recognized it in others.

From the fact that the United States and most other states have not ratified the Convention on Special Missions, the plaintiffs urge this Court to make an improper inference. The plaintiffs contend that simply because the Convention on Special Missions has not been widely endorsed as a codification of the rules of customary international law governing special diplomatic missions, no such rules exist. This is incorrect. As demonstrated in the government's original submission, such rules do exist, *see* USSOI at 10-11, the Executive Branch has the Constitutional authority to decide in which circumstances to apply them, *id*. at 4-11, such a determination has been made in this case with respect to Minister Bo, *id*. at 4, and this Court should abide by that determination, *id*. at 8-9. Indeed, the plaintiffs recognize that the Court must accept the determination that Minister Bo was on a special mission when he was present in the United States and purportedly served.

* * * *

Finally, the plaintiffs' claim that "The U.S. Government has not accepted this type of immunity as customary international law," is plainly incorrect. Not only is the United States expressly asserting such immunity as customary international law in this case, but it has made similar assertions in other cases notwithstanding the fact that the United States has not joined the Special Missions Convention. After the promulgation of that Convention, the Executive Branch asserted—and the district court accepted—just such a position in the Suggestion of Immunity it filed in *Kilroy v. Charles Windsor, Prince of Wales*, Civ. No. C-78-291 (N.D. Ohio, 1978) (*see* Attachments 2 (decision) and 3 (United States' suggestion) to USSOI). As in the present case, the Executive Branch did not rely on the terms of either the VCDR or the Special Missions Convention in making its suggestion of immunity. In exercising its Constitutional responsibility for foreign affairs generally, and in particular the President's express authority to receive, ambassadors "and other public Ministers," U.S. Const., art. II, § 3,

the Executive Branch looked to customary international law rules concerning special missions immunity and the foreign policy interests of the United States and saw fit to recognize the immunity of that emissary. The Court respected that determination and dismissed the action. *See* Attachment 2 to USSOI (*Kilroy*, Civ. No. C-78-291) at 4-6. For similar reasons, this Court should recognize the instant suggestion of special missions immunity and dismiss this action.

II. The Executive Branch Has The Authority To Suggest Special Missions Immunity On Behalf Of Senior Foreign Government Officials Invited To The United Sates.

The United States established in its initial submission that the Department of State, on behalf of the Chief Executive of the United States, retains constitutional authority under the Constitution to extend immunity to visiting high level foreign officials. See USSOI at 4-5. In Section II.D of their Response, plaintiffs mistakenly argue that the "eligibility for diplomatic or any other form of immunity" is something that "only the courts can determine." This argument, however, ignores the constitutional allocation of authority between the Executive and Judicial Branches and the established rules governing the courts' deference to Executive Branch determinations of a foreign government official's immunity from jurisdiction in appropriate circumstances.

For example, under both the domestic law of the United States and the rules of customary international law, the Head of a foreign State is immune from U.S. jurisdiction. . . . [I]t is the Executive Branch that makes the conclusive determination of Head of State immunity that the courts are bound to accept. *See Ye*, 383 F.3d at 625 ("the Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry" requiring dismissal of claims of *jus cogens* human rights violations).

. . . Because Article II, Section 3 expressly vests in the President the power and responsibility to "receive Ambassadors and other public Ministers," the exercise of discretionary foreign relations authority is not a fit subject for judicial consideration. Indeed, the

Executive Branch's judgment to invite Minister Bo to the United States for talks and to afford Minister Bo special missions immunity to further the United States' foreign affairs functions, which was expressly made "in furtherance of the President's authority under Article II of the Constitution," *see* Letter of July 24, 2006 from Legal Adviser John B. Bellinger to Assistant Attorney Genera Peter D. Keisler (Bellinger Letter) at 2, attached to USSOI as Attachment 1, is a political judgment to confer immunity that is not subject to challenge.

Such judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. *See Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974) ("[O]nce the State Department has concluded that immunity is warranted, and has submitted that ruling to the court through a suggestion, the matter is for diplomatic rather than judicial resolution"); *accord Ex parte Peru*, 318 U.S. 578, 588 (1943).

Thus, courts are bound by Executive Branch determinations of Head of State and special missions immunity even though Congress, by ratifying the VCDR, has created a comprehensive system for recognizing the immunity of diplomats serving in the permanent missions of foreign States and, by enacting the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330 and 1602, *et seq*., for recognizing the jurisdictional immunity of the foreign States themselves. Through the FSIA, the task of determining the immunity of foreign States was transferred from the Executive Branch to the courts. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA was intended to be exclusive as to claims of "sovereign immunity raised by foreign states" and political subdivisions). The FSIA and the VCDR did not, however, alter Executive Branch authority to suggest either Head of State immunity for foreign leaders or any other recognized immunities not codified in those instruments, or affect the binding nature of such Executive Branch suggestions of immunity. *See, e.g., Ye*, 383 F.3d at 625 ("The FSIA does not, however, address the immunity of foreign Heads of States"). For this reason, "the decision concerning [] immunit[ies]" not subject to those instruments "remains Vested where it was" before their

enactment or entry into force with the Executive Branch." *See id*. This includes suggestions of special missions immunity.

* * * *

In this context, . . . the Court's consideration of the government's suggestion of special missions immunity should be guided by three propositions. First, as the plaintiffs concede, the Court is bound to accept the determination that Minister Bo was on a special diplomatic mission, *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949); *see also* Bellinger Letter at 2. Second, as stated in the Suggestion of Immunity itself, *see* USSOI at 7-8, special missions immunity, though infrequently invoked, has been recognized in the United States both before and after the advent of the FSIA and the VCDR and is part of both the domestic common law and customary international law. *See* Bellinger Letter at 2-3. And finally, because the determination of special missions immunity has not been transferred to the courts, such a determination, like that for the immunity of a Head of State, head of government, or foreign minister, remains a prerogative of the Executive Branch, and one that the Judicial Branch should respect. Based upon the foregoing, the Executive Branch's determination of special missions immunity must be upheld.

* * * *

IV. Plaintiffs Misstate The United States' Position Regarding The Applicability Of The FSIA And The Act Of State Doctrine.

Contrary to plaintiffs' reading of the United States position, the United States did not suggest that the FSIA and act of state doctrine were inapplicable. *See* USSOI at 17 ("[u]nder the law of this Circuit, Minister Bo could well be viewed as an 'agent' or 'instrumentality' of China under the FSIA"). Rather, given Minister Bo's immunity from personal service and the grave foreign policy implications of adjudicating this case, the United States properly suggested that this Court need not and should not address the FSIA and act of state issues because doing so would be both unnecessary and require diplomatically sensitive inquiries by the Court; *See* USSOI at 18-19.

While the Court should not engage in this inquiry for the reasons stated, it is clear under binding Supreme Court and D.C. Circuit

precedent that in cases involving the FSIA—which, again, sets forth exceptions to the general immunity foreign States enjoy—the courts have refused to recognize alleged violation of *jus cogens* norms of international law in the form of violation of human rights as an exception to a foreign State's immunity in a civil case against that State. *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) ("however monstrous [the alleged torture and detention of the claimant] may be, a foreign State's exercise of the power of its police has long been understood for purposes of the restrictive theory [of foreign sovereign immunity] as peculiarly sovereign in nature"); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994) (rejecting argument that alleged violation of *jus cogens* norms by Third Reich constituted an implied waiver of Germany's sovereign immunity); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.").[5] Similarly, the ratification of an official's conduct by the foreign State could be the basis of finding that the act of state doctrine applied, even if the allegations claim that the conduct is *ultra vires* because they amount to gross human rights abuses. *See Doe v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005). In light of the sensitivity of these inquiries under the applicable law and the clear basis for special missions immunity in this case, however, the Court need not resolve these issues. *See Michel v. I.N.S.*, 206 F.3d 253,260 n.4 (D.C. Cir. 2000).

4. Inviolability

On May 15, 2006, the U.S. Supreme Court denied a petition for writ of certiorari to the Second Circuit in a case involving inviolability of foreign dignitaries when visiting the United

[5] [sic]Likewise, the legislative history of the Torture Victim Protection Act reflects Congress' recognition that the nature of the allegations in a lawsuit do not bear on issues of immunity. H.R. Rep. No. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 ("nothing in the TVPA overrides the doctrines of diplomatic and Head of State immunity. These doctrines would generally provide a defense to suits against foreign Heads of State and other diplomats visiting the United States on official business").

States to attend conferences convened by the United Nations. *Tachiona v. United States*, 126 S. Ct. 2020 (2006). In this case, the U.S. Court of Appeals for the Second Circuit upheld a district court decision that defendants Zimbabwean President Robert Mugabe and Foreign Minister Stan Mudenge enjoyed diplomatic immunity under the UN Convention on Privileges and Immunities and the Vienna Convention on Diplomatic Relations. The Second Circuit also found that the inviolability of Mugabe and Mudenge precluded service of process on them as to claims against a private political party, Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), reversing the district court on this issue. *Tachiona v. Mugabe*, 386 F.3d 205 (2d Cir. 2004). *Digest 2004* at 539 and 553-58. The United States had appealed as intervenor the district court decision holding that Mugabe and Mudenge could be served with process for ZANU-PF, and plaintiffs cross-appealed. *See also Digest 2002* at 324-33 and *Digest 2001* at 510-35 and 319-35.

The United States filed a brief in opposition to the grant of certiorari in April 2006 in the Supreme Court answering the two questions presented in the affirmative: (1) whether the United States had standing to appeal from the district court's judgment in this case and (2) whether the court of appeals correctly held that the president and foreign minister of Zimbabwe were not subject to service of process during a period when they were present in the United States to attend a conference at the United Nations. The U.S. brief is available at *www.usdoj.gov/osg/briefs/2005/oresponses/2005-0879.resp.html*.

D. INTERNATIONAL ORGANIZATIONS

1. International Telecommunications Union

As discussed in Chapter 11.E.2., on July 10, 2006, President Bush transmitted the 2002 amendments to the ITU Constitution and Convention to the U.S. Senate for advice and consent to ratification. S. Treaty Doc. 109-11. One of the amendments concerned privileges and immunities for members of the

Radio Regulations Board ("RRB"). The explanation and text included in the attachment to Secretary of State Condoleezza Rice's letter submitting the amendments to the President is excerpted below.

---

* * * *

The Constitution provides that Member States shall respect the international character of the duties of members of the RRB and shall refrain from efforts to influence members of the RRB in the exercise of their official duties. See Constitution, Art. 14, paragraph 3(3)(100). This provision, however, did not prevent at least one Member State that disagreed with a finding of the RRB from threatening legal action against members of the RRB. Article 14 does not clearly authorize Member States to confer on members of the RRB privileges and immunities, including immunities from legal action. In order to ensure that members of the RRB could continue to function in an independent and professional manner, several Member States proposed an amendment to the Convention to grant members of the RRB—while performing their official duties—functional privileges and immunities equivalent to those granted to the elected officials of the ITU by each Member State. See Convention, Art. 10, paragraph 4*bis* (ADD 142A). The 2002 Conference adopted this proposed amendment. The United States, in signing the Final Acts of the conference, submitted a declaration stating that the United States would confer on members of the RRB functional privileges and immunities equivalent to those accorded to officials of international organizations that are designated under the International Organizations Immunities Act, 22 U.S.C. § 288 et seq.

* * * *

. . . [The declaration (No. 71)] reads as follows:

> In regard to the privileges and immunities to be extended pursuant to ADD No. 142A of Article 10 of the Convention of the International Telecommunication Union, the United States of America shall provide

members of the Radio Regulations Board with functional privileges and immunities that are equivalent to those accorded to officials of international organizations that are designated under the International Organizations Immunities Act, 22 United States Code 288 *et seq*.

2. Holy See and African Union

Section 7(a) of the Department of State Authorities Act of 2006, Pub. L. No. 109-472 amended section 12 of the International Organizations Immunities Act, 22 U.S.C. § 288f-2, to authorize the President to extend privileges and immunities to the African Union Mission to the United States by adding the following:

> Under such terms and conditions as the President shall determine, consistent with the purposes of this title, the President is authorized to extend, or enter into an agreement to extend, to the African Union Mission to the United States of America, and to its members, the privileges and immunities enjoyed by diplomatic missions accredited to the United States, and by members of such missions, subject to corresponding conditions and obligations.

Section 7(b) provided similar authority to extend privileges and immunities to the Permanent Observer Mission of the Holy See and to its members, "the privileges and immunities enjoyed by the diplomatic missions of member states to the United Nations, and their members, subject to corresponding conditions and obligations."

Cross References

Status of U.S. foreign service officer on duty abroad, **Chapter 5.A.3.b.**

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

Actual Control of U.S. Air Carriers

On November 7, 2005, the Department of Transportation issued a notice of proposed rulemaking seeking comments "on a proposal to clarify policies that may be used during initial and continuing fitness reviews of U.S. carriers when citizenship is at issue. An airline that is a corporation must be under the 'actual control' of U.S. citizens to meet the citizenship standard." 70 Fed. Reg. 67,389 (Nov. 7, 2005). *See Digest 2005* at 588-92; *see also* supplemental notice of proposed rulemaking at 71 Fed. Reg. 26,425 (May 5, 2006). On December 5, 2006, the Department terminated its rulemaking process. 71 Fed. Reg. 71,106 (Dec. 8, 2006). Excerpts below from the December Federal Register explain the Department's decision to withdraw the proposal so as to "be free to engage in broad-ranging dialogue without the constraints of a specific rulemaking proposal."

SUMMARY: Current law requires that U.S. citizens actually control each U.S. air carrier, that U.S. citizens own or control at least 75 percent of the shareholders' voting interest, and that the president and two-thirds of the directors and the managing officers must be U.S. citizens. The Department interprets this law in conducting initial and continuing fitness reviews of U.S. air carriers.

11-Cummins-Chap11.indd 685 10/22/07 11:44:28 PM

We are withdrawing a proposal to modify by regulation the standards we apply in those cases where "actual control" by U.S. citizens is at issue.

The proposal being withdrawn would have narrowed the scope of our inquiry in such cases to those core matters affecting compliance with U.S. requirements affecting safety, security, national defense and corporate governance. These rationalized standards for deciding whether U.S. citizens maintained "actual control" of a carrier would have applied only to proposed transactions involving investors whose countries have an open-skies air services agreement with the United States and offer reciprocal investment opportunities to U.S. citizens. Our interpretation of other aspects of the statutory citizenship requirement would have been unchanged.

* * * *

Our Final Decision

We have decided to withdraw the proposal on interpretation of "actual control." We still believe there are significant benefits to be realized by liberalizing and rationalizing our domestic investment regime for U.S. air carriers. Nonetheless, our policy could gain from additional public insight into the practical advantages and drawbacks of particular administrative reforms.

* * * *

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. NAFTA Free Trade Commission Joint Statement

On March 24, 2006, then U.S. Trade Representative Rob Portman, Mexican Secretary of Economy Sergio Garcia, and Canadian Minister of International Trade David L. Emerson released a joint statement outlining the results of a meeting of the NAFTA Free Trade Commission in Acapulco, Mexico, on that date. Excerpts below from the joint statement include the Commission's commitments to conduct a review of NAFTA and to achieve a successful conclusion to the WTO's Doha round. In a press release of the same date, Ambassador

Portman described the NAFTA review as intended to be "with an eye toward improving and updating the NAFTA, the procedures, the levels of cooperation that have evolved in the 12 years since this agreement was negotiated."

The full text of the joint statement is available at *www.ustr.gov/Trade_Agreements/Regional/NAFTA/Press_Releases/Section_Indx.html*. Ambassador Portman's press release is available at *www.ustr.gov/assets/Document_Library/Transcripts/2006/March/asset_upload_file674_9168.pdf*.

---

* * * *

. . . We reaffirmed our commitment to NAFTA as the cornerstone for strengthening North American competitiveness in today's global economy. We have committed to achieving concrete, commercially-relevant results that will continue to ease the flow of goods, services, and capital between our three countries. Specifically, we have initiated work that will focus on sectors and the removal of specific impediments to the free flow of goods, services and capital. We will conduct a thorough review of the operation of the NAFTA working groups and committees in order to identify potential improvements and future work. We will also examine how our three countries might collaborate in the trade agreements with other countries and how elements of the FTA's might inform improvements to NAFTA practices such as transparency and trade facilitation. We agreed that officials will report back to ministers in six months on these issues.

We reaffirmed our commitment to achieving a successful conclusion to the WTO's Doha Development Agenda by the end of 2006. An ambitious outcome would be one of the most effective ways to generate economic growth, create potential for development and raise living standards across the world. All Ministers urged WTO partners to meet the April 30 deadline established in Hong Kong by agreeing to real, new market access in agriculture and NAMA [Non-Agricultural Market Access] consistent with the Hong Kong declaration.

* * * *

The joint statement also addressed efforts by the NAFTA Working Group on Rules of Origin "to liberalize the requirements for obtaining NAFTA duty-free treatment." To implement such modifications in the United States, on October 11, 2006, President George W. Bush issued Proclamation 8067 "To Modify Rules of Origin Under the North American Free Trade Agreement." 71 Fed. Reg. 60,649 (Oct. 13, 2006).

2. Investment Dispute Settlement under Chapter 11

During 2006 the United States participated in a number of investment disputes brought under Chapter 11 of the North America Free Trade Agreement ("NAFTA"). Several of the disputes brought against the United States are discussed here.

a. Grand River Enterprises Six Nations, Ltd. v. United States of America

On July 20, 2006, a tribunal established under the UNCITRAL Arbitration Rules and administered by ICSID found certain claims against the United States, relating to the sale of cigarettes in the United States other than on Indian reservations, time-barred under NAFTA Articles 1116(2) and 1117(2). *Grand River Enterprises Six Nations, Ltd. v. United States of America.* Other claims were reserved for consideration on the merits. Excerpts below from the opinion describe the case and the court's dismissal of claims based on when the claimants first knew or should have known of the alleged breach. (Most footnotes have been omitted).

---

* * * *

1. The Claimants brought this claim on March 12, 2004. . . . Claimants contend that various actions taken by states of the United States to implement the 1998 Master Settlement Agreement, concluded to settle litigation by several U.S. states against certain U.S. cigarette manufacturers, violate their rights under Chapter 11 of NAFTA.

While the specific actions complained of are taken by various states of the United States, the United States acknowledges that it is internationally responsible under NAFTA for their actions.[1]

2. The Claimants are Grand River Enterprises Six Nations, Ltd. of Ohsweken, Ontario, Canada, a corporation incorporated under the laws of Canada in April 1996 (hereinafter, "Grand River"); and Messrs. Jerry Montour and Kenneth Hill, also of Ohsweken, and Mr. Arthur Montour, Jr., of Seneca Nation Territory, Perrysburg, New York (hereinafter, "the individual Claimants"). The individual Claimants were all born in Canada and are members of indigenous peoples or First Nations belonging to the Six Nations of North America (also known as the Iroquois Confederacy or Haudenosaunee). . . .

3. This Decision on Objections to Jurisdiction addresses a single jurisdictional issue raised by Respondent and identified for separate treatment as a preliminary issue by the Tribunal: whether certain of the Claimants' claims must be barred as not timely under NAFTA Articles 1116(2) and 1117(2). Article 1116(2) provides:

> "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

---

[1] NAFTA Article 5 requires the parties to "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." *See* Article 4, paragraph 1, International Law Commission's Articles on State Responsibility ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the state.") For this purpose, "[i]t does not matter . . . whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations." ILC Commentary to Art. 4, para. 9, in J. Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, p. 97 (Cambridge University Press, 2002).

Article 1117(2), which deals with claims by an investor on behalf of an enterprise, is similar:

> "An investor may not make a claim on behalf of an enterprise . . . if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

4. The Parties are agreed that March 12, 2004, the date on which the Claimants' Notice of Claim was served on the Respondent, is the date on which the claim was brought and is therefore the relevant date for purposes of the jurisdictional issue considered here.

* * * *

7. The claim has its origins in litigation brought by more than 40 U.S. state attorneys general against the four major U.S. tobacco producers in the 1990's, claiming compensation for medical costs incurred by the states in treating tobacco-related illnesses. . . . [I]n November 1998 . . . a group of state attorneys general and the four major U.S. tobacco producers concluded the Master Settlement Agreement (hereinafter, "MSA"). Other states subsequently adhered to the MSA as well, and eventually 46 states, the District of Columbia and five U.S. territories became parties.

8. The MSA is a long and detailed document. Very briefly, it required each company adhering to it ("Participating Manufacturers" or "PMs") to make in perpetuity cash payments to a central account in respect of each cigarette sold by the PM, as measured by the number of cigarettes taxed by the participating states. Each participating state received a share of the substantial sums paid annually by the PMs, proportional to the share of covered cigarette sales in that state. . . .

9. Compliance with the MSA significantly increased the cost of PMs' cigarettes to consumers. . . .

10. The MSA included a key provision intended to encourage other companies to join the MSA regime. This provision, referred to by the Claimants as the "Renegade Clause," allowed additional cigarette manufacturers to join the MSA during the sixty days,

later extended to ninety days, following the agreement's conclusion in November 1998. Companies that joined the MSA during this 90-day period or subsequently were called "Subsequent Participating Manufacturers" or "SPMs." An SPM adhering to the MSA during the ninety-day sign-up period received an exemption from the MSA's payment obligations for up to 125% of its 1997 or 100% of its 1998 market share. Sales exceeding this were subject to the mandatory payments, but all sales below it remained permanently exempt. The remaining large manufacturer, Liggett Group, took advantage of this provision and adhered to the MSA during the ninety-day period. The Tribunal received evidence indicating that about 40 other cigarette manufacturers also did so. However, the Claimants contended that they did not know that they could adhere to the MSA during the ninety-day period, and it is undisputed that they did not do so prior to filing their claim. They remained a "Non Participating Manufacturer," or "NPM."

* * * *

12. The MSA's primary means to limit NPMs' ability to wrest market share from PMs was its requirement that each of the 46 participating states adopt escrow legislation precisely replicating a draft law annexed to the MSA. Under the prescribed state legislation, each NPM annually must place in escrow in a state a sum roughly corresponding to the amount it would have paid in respect of its taxed sales in that state, had it joined the MSA. These funds must be escrowed by April 15 of the year following the year in which the cigarettes were sold. . . .

* * * *

71. . . . [T]he Tribunal finds that prior to March 12, 2001, the Claimants should have known of the MSA and of the Escrow Laws and other state actions taken prior to that date to implement the MSA with respect to off-reservation sales of their products, as complained of in their Notice of Claim and Particularized Statement of Claim.

72. This finding does not extend to any state actions with respect to sales of the Claimants' products on lands within the United States set aside for the use and benefit of indigenous tribes or nations and designated under Federal law as reservations or

their equivalent. It is apparent from the Claimants' pleadings that some of their tobacco products are imported into the United States for sale to Native Americans on reservation lands, although it is unclear the extent to which such sales are alleged to be affected by any of the escrow laws or other state actions that are the basis of Claimant's claim. On-reservation sales of tobacco products, at least such sales to members of federally-recognized Indian tribes, are generally exempt from regulation by the states within the United States as a matter of Federal law. Hence, unlike the situation with regard to off-reservation sales, a reasonable and prudent investor in the position of the Claimants would not expect the state escrow laws or related actions to apply in connection with such on-reservation sales. For this reason, the Tribunal does not find that, absent actual knowledge, the Claimants should have known of the application of state escrow laws or other state laws forming the basis of its NAFTA complaint in relation to the sale of its products to Native Americans within reservation lands.

* * * *

82. *The Tribunal's Conclusions.* The Tribunal believes that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred "loss or damage" for purposes of NAFTA Articles 1116 and 1117.[38]

83. Accordingly, the Tribunal holds that the Claimants should have known prior to March 12, 2001 of the MSA, the escrow statutes, any related measures and enforcement actions taken prior to that date, and of loss or damage they incurred as a result in relation to off-reservation sales of their products. Claimants' claims with respect to all of these matters are accordingly barred by NAFTA

[38] Even if damage is viewed as having been incurred only when payment into escrow was actually required, funds covering 1999 sales had to be escrowed by April 15, 2000 in all of the 38 states adopting escrow laws during 1999.

Articles 1116(2) and 1117(2). For reasons discussed above, this holding extends only to U.S. sales of Claimants' products off-reservation and does not bar any claims with regard to on reservation sales.

b. In Re NAFTA Chapter 11/UNCITRAL Cattle Cases

On December 1, 2006, the United States submitted its Memorial on the Preliminary Issue in *In Re NAFTA Chapter 11/UNCITRAL Cattle* Cases, consolidating several cases initiated by Canadian claimants regarding the border closure due to bovine spongiform encephalopathy ("BSE") concerns. The issue submitted by agreement of the parties for preliminary treatment was as follows:

> Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North America Free Trade Area and the Claimants do not seek to make, are not making and have not made investments in the territory of the United States of America?

Excerpts below provide the background of the case and the U.S. argument that NAFTA does not provide jurisdiction over such claims (footnotes omitted; emphases in the original). The full texts of the U.S. memorial and other pleadings in *Cattle Cases* are available at *www.state.gov/s/l/c14683.htm*.

---

* * * *

Claimants are Canadian nationals engaged in the operation of cattle feedlots and other cattle-related businesses *in Canada*. They seek to challenge the United States' ban on the importation of Canadian cattle that was instituted on May 20, 2003 after the discovery of bovine spongiform encephalopathy ("BSE") in a cow in Alberta, Canada. They maintain that the United States is obligated under NAFTA Article 1102(1) to accord national treatment to Canadian investors with respect to their investments *in Canada*,

that the ban breached this obligation, and that by reason of this alleged breach they incurred losses when the profitability and value of their cattle-related investments *in Canada* decreased. Claimants assert that they are eligible to have their claims for damages resolved under the dispute resolution provisions of Chapter Eleven because their investments, even though not located in the United States, are located within the NAFTA free trade area.

* * * *

ARGUMENT

The jurisdiction of an arbitral tribunal is based on the common consent of the parties to the dispute. In treaty-based investor-State arbitrations such as those under Chapter Eleven, "the arbitrators' jurisdiction results from the initial consent of the state" expressed in the agreement "and the subsequent consent of the plaintiff, who accepts the arbitrators' jurisdiction by commencing the arbitration." In arbitrations governed by public international law, international tribunals have repeatedly insisted on an "'unequivocal indication' of a 'voluntary and indisputable' acceptance" by a sovereign of a tribunal's jurisdiction. Here, the NAFTA—the instrument delineating the scope of the United States' consent to arbitration—does not evidence any consent to arbitrate these claims under Chapter Eleven. Accordingly, claimants' claims must be dismissed for lack of jurisdiction.

The scope of NAFTA Chapter Eleven, including both its substantive and its dispute resolution obligations, is set forth in Article 1101. That Article provides, in relevant part:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party[.]

No claim for breach of a Chapter Eleven obligation may be arbitrated unless these fundamental jurisdictional prerequisites are established. As the tribunal in the *Methanex* case stated: "[Article 1101(1)] is the gateway leading to the dispute resolution

provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met."

As Article 1101(1)(b) expressly states, NAFTA Chapter Eleven applies only to those measures relating to "investments of investors of another Party *in the territory of the Party*" that has adopted or maintained those measures. Therefore, it is clear on its face that NAFTA Chapter Eleven provides for arbitration of claims only when those investments are located in the territory of the Party that has accorded the treatment.

Accordingly, arbitration of claims alleging the expropriation of *investments* in violation of Article 1110 is provided for only with respect to measures relating to investments in the territory of the expropriating State. Likewise, arbitration of claims for failure to accord *investments* the minimum standard of treatment in breach of Article 1105(1) is provided for only with respect to the treatment of investments in the territory of the State that has adopted the challenged measure. And arbitration of claims for failure to accord *investments* national treatment in breach of Article 1102(2) is provided for only with respect to measures relating to the treatment of *investments* in the territory of the State according the treatment.

Just as Article 1101(1)(b) expressly limits the arbitrability of disputes concerning measures relating to investments, Article 1101(1)(a) limits the arbitrability of disputes concerning measures relating to investors. That is, Article 1101(1)(a) limits the chapter's scope to disputes relating to investors only with respect to investments *in the territory of the State* that has adopted or maintained the measures at issue. Article 1101(1)(a) cannot be interpreted reasonably any other way.

Like all of the provisions of the NAFTA, Article 1101(1)(a) is to be interpreted "in accordance with applicable rules of international law." Article 31(1) of the Vienna Convention on the Law of Treaties sets forth the cardinal rule of treaty interpretation: a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The relevant context includes the treaty's text, its preamble and annexes and any related

agreements or instruments. For the reasons set forth below, the phrase "investors of another Party" used in Article 1101(1)(a) must be read to mean a national of such Party that seeks to make, is making or has made an investment in the territory of the Party that is subject to the obligations of Chapter Eleven.

NAFTA Chapter Eleven functions like a bilateral investment treaty ("BIT"), that is, an "international legal instrument through which two countries set down rules that will govern investments by their respective nationals in the other's territory." Such investment agreements create obligations for a contracting State "only to investors of other contracting states who make investments in its territory." The purpose of BITs and investment chapters in free trade agreements ("FTAs") is to promote and protect *foreign* investment: *i.e.*, investment by investors of one Party in the territory of another Party. That this is the purpose of the NAFTA's investment chapter is clear. One of the NAFTA's stated objectives, set forth by the Parties in Article 102, is to "increase substantially investment opportunities *in the territories* of the Parties" which evidences, as held by the NAFTA Chapter Eleven tribunal in the *Metalclad* case, the Parties' specific intent "to promote and increase *cross-border* investment opportunities."

All three NAFTA Parties, in fact, have confirmed that Chapter Eleven's purpose is to protect those investors that are seeking to make, are making or have made investments in another NAFTA Party's territory and the investments of those investors located in another NAFTA Party's territory. The United States Statement of Administrative Action ("SAA")—an instrument submitted to Congress in connection with the conclusion of the NAFTA that evidences the intent of the United States with respect to the Treaty's content—confirms that Chapter Eleven "applies where such firms or nationals make or seek to make *investments in another NAFTA country*." The United States SAA further specifies that "Part A [of Chapter Eleven] sets out each government's obligations with respect to investors from other NAFTA countries and their *investments in its territory*." Similarly, in a contemporaneous report to Congress, the United States General Accounting Office characterized Chapter Eleven as containing "each signatory's obligations with respect to any measure of a NAFTA party that affects investment *in its territory* by an investor of another NAFTA party."

11-Cummins-Chap11.indd 696 10/22/07 11:44:29 PM

Likewise, in the Canadian Statement on Implementation of the NAFTA, a document similar to and contemporaneous with the United States SAA, the Government of Canada explained that Chapter Eleven built upon Canada's prior experience with "investment agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad." In the *S.D. Myers* arbitration, Canada reiterated its understanding that Chapter Eleven applies only to investors that have, or are seeking to make, investments in the territory of the disputing Party.

Mexico has similarly asserted, in the *Bayview Irrigation District* arbitration, that "Chapter Eleven, and the over 2,500 Bilateral Investment Treaties aim to promote and protect foreign investment. They are not treaties to protect . . . the property of one state[']s nationals] in that same state." Mexico further stated, "Chapter Eleven in particular, only applies to investments of investors of a Party in the territory of another Party, and to the investors of another Party insofar as they have made such investments."* Thus, all three Parties to the NAFTA agree that the obligations in Chapter Eleven do not extend to so-called "investors" of a Party that have not invested, and do not intend to invest, in another NAFTA Party, but have invested only in the territory of their home State.

Commentators and practitioners in the field of investor-State arbitration have likewise uniformly confirmed that the object and purpose of the NAFTA's investment chapter is to protect investors with respect to their investments in the territory of another NAFTA Party.

The object and purpose of promoting and protecting *foreign* investment is advanced only if the treaty is interpreted to provide protections for *foreign* investments and to *foreign* investors who have made or are seeking to make investments in the territory of the other treaty partner. Claimants' contention that NAFTA Chapter Eleven applies to measures that relate to investors that

* Editor's note: The United States filed a submission under NAFTA Article 1128 on November 27, 2006, supporting this position, available at *www.state.gov/s/l/c20028.htm*.

have not made, and do not intend to make, investments in another NAFTA Party cannot be reconciled with the object and purpose of an international investment agreement, like NAFTA Chapter Eleven.

For this reason, an ICSID tribunal refused to interpret a BIT as providing protection for investments that were made in the claimant's home State where the BIT in question did not contain a territorial specification in each of its provisions. In *Gruslin v. Malaysia* [ICSID Case No. ARB/904/1, Award ¶13.7 (Nov. 27, 2000)], the claimant—much like claimants here—argued that the BIT at issue applied to all investments, regardless of whether or not they were in the territory of the respondent State. . . .

The sole arbitrator rejected the claimant's argument, finding that the meaning of the terms of the agreement in question must be informed by the purpose of the agreement, which included creating favorable conditions for investments by nationals of one Party in the territory of the other Party. The arbitrator noted that the "absence of qualifying words of limitation to the word 'investment' in Article 10 [the consent article] itself does not broaden the class of investments included by the [investment agreement]."

Claimants here make the same fallacious argument rejected in *Gruslin*—that the absence of express territorial limitations in NAFTA Article 1101(1)(a) should be interpreted to mean that the national treatment obligation in NAFTA Chapter Eleven applies to all investors, regardless of the location of their investments. Claimants' argument that the United States must arbitrate claims relating only to their investments *in Canada* makes no sense in light of the clear object and purpose of the NAFTA's investment chapter. For this reason alone, claimants' claims should be dismissed.

That this Tribunal lacks jurisdiction over claimants' claims is also clear from the context in which the terms of Article 1101(1)(a) must be read. The term "investor of a Party" in Article 1101(1)(a) cannot be read in isolation and interpreted, as claimants' suggest, to mean that Chapter Eleven's scope extends to any investor that has made an investment in its home State. Rather, read in context, the term clearly means an investor that has made, or is seeking to make, an investment in the territory of another NAFTA Party.

Indeed, claimants' counsel himself has confirmed this interpretation, noting in a law review article that NAFTA Article 1101, in conjunction with Articles 1116 to 1121, set forth the necessary elements for a NAFTA Chapter Eleven claim, which include "the existence of: (1) a qualifying NAFTA 'investor' *with* (2) an 'investment' *in another NAFTA party*."

The substantive obligations contained in Section A of NAFTA Chapter Eleven provide context for interpreting Article 1101. While most of those obligations address protections for investments, some of them, like Article 1102(1), provide protection for investors. In each instance where the provision obligates a Party to provide a level of treatment to investors, it does so only *with respect to* the investor's investments that are in the territory of the State that has adopted or maintained the measure at issue. The NAFTA nowhere obligates a Party to provide a level of treatment to investors that have not made or are not seeking to make investments in another NAFTA Party. Consequently, it defies logic to interpret Article 1101(1)(a)—the scope and coverage provision—more expansively than the scope of any of the substantive obligations. Article 1102(1)—the only substantive obligation at issue in these cases—provides:

> Each Party shall accord to *investors* of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Thus, Article 1102(1), unlike Article 1102(2) or other provisions in the Chapter, extends the national treatment obligation specifically to the treatment of investors. The term "investor of a Party" is defined in Article 1139 as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." The national treatment obligation in Article 1102(1), however, only applies to investors with respect to certain investment activities—*i.e.*, the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Article 1102(1)'s national

treatment provision must be read to apply only to investors that have made or are seeking to make investments in another NAFTA Party. Any other reading would lead to absurd results.

* * * *

Indeed, any other reading of Article 1102(1) is so implausible that when interpreting this provision, the *ADF* [*Group Inc. v. United States*] NAFTA Chapter Eleven tribunal presumed that the obligation applies only with respect to an investor when that investor has an investment in the territory of the other treaty partner. As that tribunal explained:

> Article 1102 entitles an *investor* of another Party and its investment to equal (in the sense of 'no less favorable') treatment, in like circumstances, with a Party's domestic investors and their investments, from the time of entry and 'establishment' or 'acquisition' of the investment *in the territory of that Party*, through the 'management,' 'conduct' and 'operation' and 'expansion' of that investment, and up to the final 'sale or other disposition' of the same investment.

This interpretation comports with the United States' contemporaneous understanding of the NAFTA's national treatment obligation. . . .

The fact that the NAFTA Parties intended that the national treatment obligation would apply only with respect to measures taken in their respective territories is further supported by the text of Article 1102(3) and (4). In those provisions, the NAFTA Parties expressly provided, in the interest of "greater certainty," that no Party may "impose on an investor of another Party a requirement that a minimum level of equity in an enterprise *in the territory of the Party* be held by its nationals," and that no Party may require investors from another Party to dispose of their investments *in its territory* simply on the grounds of nationality. This language exemplifies the kind of legislation the NAFTA Parties' sought to prohibit with the national treatment obligation: domestic legislation designed to restrict or burden *foreign* investment,

not domestic legislation that adversely affects investors or investments operating exclusively within the territory of another contracting State.

Reviewing the negotiating history of the NAFTA further confirms the meaning of Article 1101(1)(a). The investment chapter of the predecessor Canada-U.S. Free Trade Agreement and the model U.S. BIT served as the basis for negotiations of NAFTA Chapter Eleven. The Canada-U.S. FTA confines its "Scope and Coverage" to "any measure of a Party affecting investment within or into its territory by an investor of the other Party." Similarly, the model US BIT in use at that time contained language in its "chapeau" concerning "investment by nationals and companies of one Party in the territory of the other Party" and defined "investment" as "every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party." In fact, every BIT and FTA investment chapter to which the United States is a Party likewise restricts its coverage to investors of one Party that has made or is seeking to make investments in the other Party.

* * * *

To accept claimants' suggestion that NAFTA Chapter Eleven applies to investors of a NAFTA Party that have not made, are not making, and do not intend to make investments in the territory of another NAFTA Party would require the Tribunal to conclude that the NAFTA Parties intended to fundamentally alter the scope of the investment chapter when they deleted language during the "legal scrub" of Chapter Eleven. The language in question, however, was eliminated without note or comment in the subsequent negotiating texts. Had the Parties intended to radically extend the coverage of the investment chapter beyond the coverage of any previously (or subsequently) negotiated BIT or FTA investment chapter, one would have anticipated that such an amendment would have been the subject of extensive negotiation and commentary, and would not have been made in the "legal scrub." The preparatory work of the NAFTA thus confirms its ordinary meaning and requires dismissal of claimants' claims.

* * * *

c. Softwood Lumber Consolidated Proceeding

On September 7, 2005, a consolidation tribunal issued an order granting the request of the United States for consolidation of three claims against the United States submitted to arbitration under NAFTA Chapter Eleven: *Canfor Corporation v. United States, Tembec Inc. v. United States*,* and *Terminal Forest Products Ltd. v. United States*. *See Digest 2005* at 596-602. *See also* discussion of Softwood Lumber Chapter 19 binational review panel, *Digest 2005* at 602-05. The full texts of pleadings and orders in the consolidated case are available at *www.state.gov/s/l/c14432.htm*.

On June 6, 2006, the arbitral tribunal established under the UNCITRAL Arbitration Rules and administered by ICSID in the case issued its Decision on Preliminary Question. The Tribunal described the issue presented in these claims under Chapter Eleven concerning antidumping and countervailing duties and summarized its conclusions as follows:

> 1. Presently before the Tribunal is the question whether Article 1901(3) of the NAFTA ("Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law") bars the submission of Claimants' claims with respect to U.S. antidumping and countervailing duty law to arbitration under Chapter Eleven of the NAFTA (the "Preliminary Question").
>
> 2. The Tribunal decides with respect to the Preliminary Question that the Tribunal has no jurisdiction to decide on Claimants' claims to the extent that they concern United States antidumping and countervailing duty law,

* The Tribunal terminated the proceedings as to Tembec on January 10, 2006; *see* Order for the Termination of the Arbitral Proceedings with respect to Tembec (Jan. 10, 2006) and Decision on Preliminary Question, Part III. Pleadings concerning Tembec's motion to vacate the consolidation order, filed on February 27, 2006, in the U.S. District Court for the District of Columbia, *Tembec v. United States*, Case No. 05-2345(RMC), are available at *www.state.gov/s/l/c17639.htm*.

> including conduct of [the U.S. Department of] Commerce, the [International Trade Commission ("ITC")] and other government entities and officials prior to, during and subsequent to the preliminary and final determinations in relation to such antidumping and countervailing duty law, but that the Tribunal does have jurisdiction to decide on Claimants' claims to the extent that they concern the Byrd Amendment,* for the reasons given below and in the manner set forth in Chapter VIII of this Decision.

Before turning to the legal analysis leading to these conclusions, the Tribunal set forth its Approach to the Preliminary Question, Part VI, Section C. The Tribunal reviewed the parties' positions with respect to the approach to determining jurisdiction of the Tribunal and opinions in three cases addressing jurisdictional questions: *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on Preliminary Objection, December 12, 1996, 1996 I.C.J. Reports (II), 803 at 810; *Methanex Corporation v. United States of America*, Preliminary Award on Jurisdiction and Admissibility, August 7, 2002, NAFTA (UNCITRAL); and *United Parcel Service Inc. v. Canada*, Award on Jurisdiction, November 22, 2002, NAFTA (UNCITRAL). The Tribunal then stated as follows (footnotes omitted).

---

* * * *

171. The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:

> – First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction.

---

* Editor's note: As described by the Tribunal, "Canfor also claims damages for losses caused by the allegedly illegal Byrd Amendment, enacted into United States law in 2000, which provides that duties assessed pursuant to countervailing duty or antidumping orders shall be distributed annually to affected U.S. domestic producers."

> It is the tribunal that must decide whether the requirements for jurisdiction are met.
> – Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied.
> – Third, the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction.
> – Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are *prima facie* capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.

172. It is also clear that, in determining jurisdiction by applying the above test, a NAFTA tribunal is not in any way prejudging the merits of the case.

173. It should be added that it is not required that these jurisdictional issues must be addressed by a tribunal in a separate, preliminary phase prior to consideration of the merits. A tribunal is entitled to join them, or one or more of them, to the merits. (fn. omitted) In accordance with this principle, the Tribunal has joined to the merits a number of the United States' objections and related issues (*see* Procedural Order No. 1, quoted at paragraph 10 above).

174. Considering the above scheme, the question arises how the United States' invocation of Article 1901(3) of the NAFTA fits within it, if at all. Claimants believe that Article 1901(3) is an interpretative provision that does not concern jurisdiction, for which reason they are of the opinion that the test set forth in *Oil Platforms*, *UPS* and *Methanex* need not be applied. In contrast, the United States is of the view that it is a jurisdictional provision, but proposes a test different from the one in *Oil Platforms*, *UPS* and *Methanex* (i.e., the test enunciated in the separate opinion of Judge Koroma in the *Fisheries Jurisdiction Case*).

175. The rival positions of the parties on this issue appear to stem from their differing positions as to how Article 1901(3) is to be interpreted. That is the very object of the Preliminary Question. The Tribunal, therefore, will first interpret Article 1901(3), and, depending on the outcome of that interpretation, examine whether the objection raised by the United States, which is presented as a jurisdictional objection, passes the test summarized in paragraph 171 above. . . .

* * * *

188. At the outset, it may be recalled that Chapter Nineteen concerns: "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," and that the genesis of this Chapter is that the State Parties to the NAFTA were unable to agree on uniform standards for their antidumping and countervailing duty laws and, as compromise, agreed to have final domestic antidumping and countervailing duty determinations reviewed by a binational panel mechanism (as was the case under the Canada—United States Free Trade Agreement of 1989). It may also be recalled that the scheme of Chapter Nineteen is set up accordingly. Article 1902 establishes the principles that a State Party has the right to retain its antidumping and countervailing duty law, has the right to change or modify that law, but that in the case of an amendment of an antidumping or countervailing duty statute it has to comply with certain conditions, including notification of such amendment to the other State Parties prior to enactment. Article 1903 provides that a State Party may have recourse to a binational panel if it believes that another State Party's amendment of an antidumping or countervailing duty statute is non-compliant.

After a lengthy analysis of the interpretation of the language of Article 1901(3), the court stated in ¶ 273:

> In conclusion, (i) having regard to all the foregoing considerations, (ii) in light of the objective of efficient proceedings as set forth in Article 102(1)(e), and (iii) notwithstanding the principle that exclusion clauses are to be interpreted narrowly, the text of Article 1901(3) does not, in the judgment of the Tribunal, leave room for any other interpretation than that the entire Chapter Eleven

> does not apply with respect to the antidumping law and countervailing duty law of a State Party to the NAFTA. As previously quoted, that text specifically stipulates: ". . . no provision of *any* other Chapter of *this Agreement* shall be construed as imposing *obligations* . . ." (emphasis added). Based on the foregoing analysis, the inescapable conclusion must be that the exclusionary language of Article 1901(3), in the absence of an express exception to the contrary, encompasses all obligations stemming from Chapter Eleven, including those related to dispute settlement. That preclusion necessarily encompasses all claims related to conduct of Commerce, the ITC and other government entities and officials prior to, during and subsequent to preliminary and final determinations in relation to United States antidumping and countervailing duty laws.
>
> The Tribunal then turned to an examination of claims relating to the Byrd Amendment. The Tribunal first explained the statute and the related proceedings before the World Trade Organization and the International Trade Commission.

---

* * * *

274. . . . [O]n 28 October 2000, the United States enacted the Continued Dumping and Subsidy Offset Act of 2000, which amended Title VII of the Tariff Act of 1930 by inserting a new Section 754 ("CDSOA" or "Byrd Amendment").

* * * *

276. The operative provision of the Byrd Amendment reads:

> Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section [i.e., § 1675c] to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the "continued dumping and subsidy offset".

* * * *

282. The United States expressly admits that it did not notify the Byrd Amendment to Canada "prior to enactment" as was required under Article 1902(2)(b) of the NAFTA (assuming, as later described, that the Byrd Amendment constituted an "amending statute" thereunder).

* * * *

284. In 2001, Canada and Mexico (as well as Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand) brought a complaint against the United States before the WTO, asserting that the Byrd Amendment (i.e., the CDSOA) constituted a specific measure against dumping and subsidies not contemplated by either the WTO AD Agreement or the WTO SCM Agreement. On 27 January 2003, the Dispute Settlement Body ("DSB") adopted the report of the Panel, as modified by the report of the Appellate Body, to the effect that the CDSOA: (a) is a non-permissible specific action against dumping or a subsidy, contrary to Articles VI:2 and VI:3 of the GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement; (b) is inconsistent with certain provisions of the AD Agreement and the SCM Agreement, with the result that the United States failed to comply with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement; and (c) pursuant to Article 3.8 of the DSU, to the extent that the CDSOA is inconsistent with provisions of the AD Agreement and the SCM Agreement, nullifies or impairs benefits accruing to the complaining parties under those Agreements.

285. Subsequent to the failure of the United States to repeal the Byrd Amendment within the required time, Canada and other WTO Members were authorized by the WTO DSB to levy retaliatory duties reflecting the "trade effect" of the CDSOA.

286. Neither Canada nor Mexico requested a review of the Byrd Amendment in binational panel review proceedings under Article 1903 of the NAFTA. The Tribunal has no information as to why this is so.

287. In 2005, the Government of Canada and several Canadian trade associations and exporters filed complaints with the U.S. Court of International Trade (the "CIT") related to the Byrd Amendment. Each plaintiff claimed that the U.S. Customs and Border

Protection ("Customs") acted unlawfully when it applied the Byrd Amendment to disburse to domestic producers antidumping and countervailing duties assessed on imports of goods from Canada because, pursuant to Section 408 of the NAFTA Implementation Act, the Byrd Amendment failed to so specify as required thereunder. By a decision of 7 April 2006, the CIT found that the plaintiff Canadian exporters, but not the Government of Canada, were authorized to bring the action, and that Customs had violated U.S. law, specifically Section 408 of the NAFTA Implementation Act, in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico. The CIT did not decide on the proper remedy, in respect of which the CIT ordered further briefing.

288. Previously, on 8 February 2006, the President of the United States signed into law the Deficit Reduction Act of 2005 [Pub. L. No. 109-204], which includes a provision repealing the Byrd Amendment. The provision stipulates that the repeal is effective upon the date of enactment of the Act, while also providing that "all duties on entries of goods made before and filed before October 1, 2007," shall be distributed as if the Byrd Amendment had not been repealed. The transition period is reportedly the result of a compromise reached during consideration of this Act by the United States Congress.

* * * *

315. Th[e] lack of timely notification as required by Article 1902(2)(b) has, in the Tribunal's view, the consequence that an "amending statute," which purportedly pertains to antidumping or countervailing duty law, cannot be regarded as having become part of that "law" for purposes of the definition contained in Article 1902(1). . . .

316. While the extent of the antidumping and countervailing duty statutes then in force in the three State Parties was therefore clearly defined for purposes of the NAFTA, each State Party retained the right to amend its statutes in the future. However, as mentioned, this right of amendment was subjected to the requirements of Article 1902(2), including pre-enactment notification to the other State Parties pursuant to Article 1902(2)(b). If a State

Party were to fail to comply, it thereby would fail to bring a particular statutory amendment within the definition of antidumping or countervailing duty statute of Article 1911 and Annex 1911. The consequence of such a failure would be that the new statutory amendment in question would not become part of the definition of antidumping and countervailing duty "law" under Article 1902(1). That result in turn would have the further consequence that that statutory amendment would not become part of antidumping and countervailing duty "law" within the meaning of Article 1901(3). This sequence, in the Tribunal's view, is the price that the Parties set under Chapter Nineteen for failing to comply with the carefully delineated requirements set forth in Article 1902(2).

* * * *

341. In particular, in the Tribunal's judgment, the Claimants have made a *prima facie* showing that, while not constituting antidumping or countervailing duty law within the meaning of Article 1901(3), the Byrd Amendment may ultimately be proven to have conferred financial benefits on United States investors or investments in competition with the claimant Canadian investors that are demonstrably contrary to the national treatment provisions of Article 1102.

* * * *

d. Glamis Gold, Ltd. v. United States of America

On September 19, 2006, the United States filed its counter-memorial in *Glamis Gold, Ltd. v. United States of America.* In this case, Glamis Gold Ltd., a publicly-held Canadian corporation engaged in the mining of precious metals, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on behalf of its enterprises Glamis Gold, Inc. and Glamis Imperial Corporation for alleged injuries relating to a proposed gold mine in Imperial County, California ("the Imperial Project"). Glamis claims that certain federal government actions and California measures with respect to open-pit mining operations resulted in the expropriation of its investments

in violation of Article 1110, and denied its investments the minimum standard of treatment under international law in violation of Article 1105. The California measures include regulations requiring backfilling and grading for mining operations in the vicinity of Native American sacred sites.

Excerpts below from the U.S. counter-memorial address the scope of Glamis' property rights; the absence of any specific assurance that certain actions would not be taken to support a finding of indirect expropriation; and the content of the customary international law minimum standard of treatment as prescribed in Article 1105. The full text of the counter-memorial and other submissions and orders in the proceeding are available at *www.state.gov/s/l/c10986.htm*.

* * * *

Glamis's claims have no basis in law or fact, and should be dismissed in their entirety. The federal government diligently processed Glamis's plan of operations over the course of several years. . . . Only Glamis's announcement that it considered its mining claims to have been expropriated cut that processing short. Glamis falls far short of meeting its burden of demonstrating that the federal government measures it challenges, some of which occurred too long ago to be considered in this arbitration, either expropriated its investment in its unpatented mining claims or otherwise breached the customary international law minimum standard of treatment.

Likewise, the California measures at issue here, namely: (1) amendments to the California Mining and Geology Board's reclamation regulations (the "SMGB regulations"); and (2) California Senate Bill 22 ("SB 22") in no way violate international law. The amended SMGB regulations and SB 22 are two distinct, if overlapping, measures that require backfilling of all open pits and recontouring of the land after cessation of metallic mining activities.

The SMGB first amended its reclamation regulations on an emergency basis in December 2002 for the immediate preservation of the public welfare. Threatening the public welfare was the potential approval of any additional open-pit metallic mine in California, including Glamis's proposed mine, that would not be subject to these

reclamation requirements. Existing mines not subject to such requirements were found to have left mined lands in an unusable condition and posed threats to the environment, as well as to public health and safety. Glamis had every opportunity, which it took, to participate in the democratic process that led to the adoption of these reclamation requirements. That its position failed to prevail does not grant it any right to seek redress in international arbitration.

The California Legislature in April 2003 enacted SB 22, which contains reclamation requirements similar to those in the SMGB regulations, but is intended to accommodate the Quechan's free exercise of religion and to otherwise protect Native American sacred sites from irreparable harm. SB 22 was enacted nearly five months *after* the date on which Glamis alleges its mining claims were expropriated. SB 22, therefore, cannot have caused Glamis any additional harm.

Glamis has a property interest in its unpatented mining claims, which it retains in full. What Glamis does not have—and never had—is a right to have any particular plan of operations or reclamation plan approved. Glamis remains free to mine upon obtaining federal government approval of its plan of operations as long as it backfills all open pits and re-contours the land after cessation of mining activities. Glamis's unpatented mining claims, however, never included the right to mine in any manner which interfered with the state's ability to accommodate the free exercise of religion, injured Native American sacred sites or endangered the environment or public health and safety.

* * * *

II. Glamis's Expropriation Claim Is Without Merit

* * * *

B. The California Measures Did Not Interfere With Any Property Right Held By Glamis And, Thus, Are Not Expropriatory

* * * *

The [Mining Law of 1872, Rev. Stat. § 2319 (1878); ch. 152, § 10, 17 Stat. 91 (codified in scattered sections of 30 U.S.C.)(Mining Law")] gives U.S. citizens the right "to explore, discover, and extract valuable minerals from the public domain and to obtain title to

lands containing such discoveries.". . . This right of exploration is a gratuity from the government that can be withdrawn at any time. The rights in a mining claim on federal public lands are hierarchical: the locator of an "unpatented" mining claim merely holds a possessory interest in, while the owner of a "patented" mining claim holds title to, the land.

All of the mining claims that comprise the Imperial Project site are unpatented mining claims. . . .

* * * *

. . . Glamis's unpatented mining claims confer a possessory interest that is subject to wide-ranging federal, state, and local regulations, including state regulations that may require a higher standard of protection for public lands than federal law, and include no right of approval for a specific proposed mining project or reclamation plan. Moreover, . . . background principles of the U.S. and California Constitutions and California property law serve to further restrict the bundle of property rights Glamis holds in its unpatented mining claims. Given the broad, pre-existing limitations on Glamis's property rights, the specific, later-in-time implementation of those limitations by the challenged California measures cannot be deemed expropriatory.

2. Laws And Regulations That Merely Specify Pre-Existing Limitations On Property Rights Are Not Expropriatory

In reviewing regulatory action in takings claims, the U.S. Supreme Court has traditionally resorted to "existing rules or understandings that stem from an independent source such as state law," when determining if a claimant holds an interest that qualifies for protection under the Fifth and Fourteenth Amendments as "property." As such, "[i]f the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," the government need not compensate a property owner, no matter what the economic impact of the challenged regulations. In such a case, the challenged law or decree "inheres in the title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon land ownership."

* * * *

International tribunals also recognize that the scope of property rights is informed by the legislative and regulatory framework existing at the time such rights are acquired. For example, in the *Tradex* case [*Tradex Hellas S.A. v. Republic of Albania*, ICSID No. ARB/94/2, Award ¶ 153 (Apr. 29, 1999)] . . . the tribunal found that a pre-existing Albanian land law limited the property rights at issue in that case. The tribunal found that certain references to an Albanian land law in the joint-venture agreement established that "the parties to the Agreement, including Tradex, accepted future application of the Land Law and that the investment was subject to future applications of the Land Law, in other words: subject to future privatizations." Such a limitation on Tradex's investment "from the very beginning" would allow Albania to argue that "the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation."

The same principle was applied by the [NAFTA Chapter 11] tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* when denying claimant's expropriation claim. The *Feldman* tribunal observed that the claimant had been "stymied by a longstanding requirement" under the applicable excise tax law, which required, for tax rebate purposes, the presentation of certain invoices. Because claimant had not been in a position to obtain such invoices "at any relevant time," the tribunal found that the claimant never possessed a "'right'" to obtain tax rebates upon export of cigarettes. Accordingly, the tribunal found, "this is not a situation in which the Claimant can reasonably argue that post investment changes in the law destroyed the Claimant's investment, since the [excise tax] law at all relevant times contained the invoice requirements." Any later-in-time denial of tax rebates based on claimant's failure to meet the pre-existing invoice requirements therefore was not expropriatory.

Likewise, the [NAFTA Chapter 11] tribunal in *International Thunderbird Gaming Corporation v. United Mexican States* specifically denied an expropriation claim under NAFTA Article 1110 on the ground that "compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited." The tribunal in that case found the claimant

never had a right to operate gaming machines in Mexico because the operation of such machines was prohibited by Mexican law. Given this pre-existing legal limitation, the *Thunderbird* tribunal held that Mexico could not have expropriated a property interest the claimant never held.

Thus, the *Tradex*, *Feldman* and *Thunderbird* tribunals recognized the same proposition as was applied in the domestic U.S. cases discussed above: where property rights are, from their inception, subject to a broad restriction, the claimant's property right does not include the right to engage in the activity proscribed by (or the right to be relieved from the requirements imposed by) the subsequent application of that restriction. The subsequent application of that pre-existing limitation on property rights, therefore, is not expropriatory. Glamis's unpatented mining claims are subject to such pre-existing limitations, which were merely implemented by the challenged California measures. Accordingly, those measures interfered with no property right held by Glamis.

. . . [T]he unpatented mining claims that comprise the Imperial Project were located after 1980. Long pre-dating those claims were principles of religious accommodation enshrined in the First Amendment of the United States Constitution and Article I of the California Constitution as well as the California Legislature's enactment of the Sacred Sites Act in 1976 (prohibiting irreparable damage to Native American sites on public land absent a showing of necessity) and [the Surface Mining and Reclamation Act of 1975 ("SMARA")] in 1975 (requiring mined lands to be reclaimed to a "usable condition which is readily adaptable for alternate land uses and create no danger to public health and safety").

Glamis's unpatented mining claims, therefore, never included the right to limit California's authority to accommodate Native American religious practices, or to mine in a manner that irreparably damage[d] Native American cultural and religious sites (in violation of the Sacred Sites Act) or to fail to reclaim mined lands to a usable condition (in violation of SMARA). Senate Bill 22 merely implements, in the specific context of surface mining operations, pre-existing principles of religious accommodation under the U.S. and California Constitutions and pre-existing protections for Native American cultural and religious sites under the Sacred Sites Act, and thus did not expropriate any property right that Glamis

ever held. Similarly, the amendments to the SMGB regulations, which merely implement, in the specific context of open-pit metallic mining operations, the pre-existing reclamation standard under SMARA, interfered with no property right held by Glamis.

* * * *

III. Even if Glamis Did Have A Property Interest In A Particular Reclamation Plan, Glamis's Investment Was Not Indirectly Expropriated By SB 22 or The SMGB's Amended Regulation

Even assuming *arguendo* that the Tribunal were to find that Glamis does have a property interest in having its reclamation plan approved and in mining in a manner that destroys Native American sacred sites and causes environmental harm, Glamis's expropriation claim still fails. Glamis's claim is one for indirect expropriation. The determination of whether an expropriation in violation of international law occurred is made through a factual inquiry into the circumstances of a particular case, which involves considering: (1) the economic effect of the action on the claimant's property; (2) the extent to which the government action interferes with the claimant's reasonable investment-backed expectations; and (3) the character of the government action.

* * * *

B. Glamis Could Have Had No Reasonable Expectation That It Could Conduct Mining Operations Free From California's Reclamation Requirements

Glamis could not reasonably have expected that California would never impose more specific reclamation requirements for open-pit metallic mines in the state. Glamis's expectations should have been shaped by, among other things, the fact that: (i) Glamis received no specific assurances from the government that the reclamation requirements would not be specified before Glamis obtained approval of a plan of operations or reclamation plan; (ii) the mining claims Glamis acquired were located in an area it knew or should have known contained significant historic and cultural resources that were protected by an array of laws; and (iii) mining is a highly regulated industry in the United States—particularly in California—and regulations continually evolve as sovereign entities seek to better protect the public welfare and public resources.

1. Glamis Received No Specific Assurances That The Legislative And Regulatory Environments In California Would Not Change

Tribunals applying international law have held that, in the absence of specific assurances by the host State, an investor can have no reasonable expectation that the State will not regulate or legislate in the public interest in a manner that may affect the value of its investment. Where an investor conducts business in a highly regulated industry, and where its investment could negatively impact important resources—such as environmental, or cultural and historic resources—it is unreasonable for that investor to expect that its investment would not be subject to further regulation to protect those valued resources absent specific assurances to the contrary.

Glamis received no specific assurances that measures protecting Native American sacred sites, or implementing SMARA's reclamation requirements, would not be applied to its proposed Imperial Project. Glamis has not cited a single international law authority in which a *bona fide* regulation in the public interest, such as California's reclamation measures, has been deemed expropriatory in the absence of specific assurances to the investor that were abrogated by later regulation.

In *Methanex Corp. v. United States of America*, the claimant, a Canadian methanol producer, alleged that a ban on the use and sale in California of the gasoline additive MTBE had the effect of expropriating its investments. The tribunal noted that Methanex entered the United States market fully aware that the regulations concerning gasoline content were subject to regulatory change, and "did not enter the United States market because of *special representations* made to it." The tribunal contrasted the facts of the case with those in *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation*, [17 I.L.M. 1321, 1332 (1978)] "where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured." The *Methanex* tribunal noted that:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign

> investor or investment is not deemed expropriatory and compensable unless *specific commitments* had been given by the regulating government to the then putative investor contemplating investment that the government would refrain from such regulation.

The tribunal dismissed the claim under NAFTA Article 1110, noting that Methanex had not received any specific commitments that California would not further regulate the contents of its gasoline.

Likewise, in *Feldman v. Mexico*, the NAFTA tribunal rejected the claimant's expropriation claim largely because the claimant failed to prove that he made his investment in reliance on specific commitments by the Mexican government that allegedly were breached by Mexico. Notably, the tribunal found that the actions of the Mexican taxing authority with respect to Feldman's investment were "arbitrary," "inconsistent," "ambiguous and misleading, perhaps intentionally so in some instances," "[un]reasonable," and "without doubt . . . lack[ed] transparency." The tribunal also found that "the Claimant, through the respondent's actions, [was] deprived completely and permanently of any potential economic benefits from that particular activity." The tribunal nonetheless dismissed Feldman's expropriation claim for lack of evidence of clear and specific assurances that Feldman would receive the tax treatment to which he claimed entitlement.

The *Feldman* tribunal contrasted its decision with that in *Metalclad*, where "the tribunal, in reaching its finding of indirect expropriation, . . . found it important that Metalclad had relied on the representations of the Mexican federal government of its exclusive authority to issue permits for hazardous waste disposal facilities." The tribunal further observed that "the assurances received by the investor from the Mexican government in *Metalclad* were definitive, unambiguous and repeated, in stating that the federal government had the authority to authorize construction and operation of hazardous waste landfills." "In contrast," noted the tribunal, "in the present case the assurances allegedly relied on by the Claimant (which assurances are disputed by Mexico) were at best ambiguous and largely informal." Finally, the tribunal noted that neither Mexican tax laws, nor the NAFTA, nor customary

international law accorded Feldman "a 'right' to export cigarettes" or "a 'right' to obtain tax rebates upon exportation of cigarettes."

Unlike the claimant in *Feldman,* Glamis did not receive *any* assurances—informal or otherwise—from the State of California that the reclamation requirements for open-pit metallic mines would never be made specific, or that any changes would not affect Glamis's proposed Imperial Project. Moreover, the federal regulations made clear that Glamis's mining claims would be subject to California laws and regulations.

Nor did the exclusion from the CDPA of buffer zones surrounding wilderness areas near the proposed Imperial Project constitute a specific assurance, as Glamis suggests. Congress passed the California Desert Protection Act ("CDPA") in 1994, and in so doing it withdrew from development the Indian Pass and Picacho Peak Wilderness Areas. In the CDPA, Congress provided that it did not intend to create "buffer zones" around the wilderness areas created by the Act. Specifically, the CDPA states:

> The Congress does not intend for the designation of wilderness areas in section 102 of this title to lead to the creation of protective perimeters or buffer zones around any such wilderness area. The fact that non-wilderness activities or uses can be seen or heard from areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

Glamis repeatedly misstates both the meaning and the purpose of this passage and argues that the "no buffer zone" language provided it with reasonable expectations that the Imperial Project would not be subject to any future regulatory requirements. The plain language of the Act is clear: the fact that non-wilderness activities (such as mining) can be seen or heard from areas within the wilderness "shall not, *of itself*" preclude those activities. The legislative history of the Act confirms its meaning:

> The Committee intends by the inclusion of the phrase ["of itself"] that, *standing alone,* the designation of wilderness areas by section 102 should not be construed to extend

> restrictions on non-wilderness sights and sounds to land outside the boundary of the wilderness area. *Such non-wilderness sight and sounds would be subject to regulation, if any, flowing only from the application of other law*. For example, the fact that a mining operation can be seen or heard from a point within a wilderness area is not sufficient to impose restrictions on that mining operation *that are not the result of provisions in other applicable law*.

Glamis concludes from this language that the Imperial Project area was "to remain open to multiple-use development including mining." The plain language of the Act, confirmed by the legislative history, however, makes clear that the "buffer zone" language in the Act does not prevent regulation of uses such as mining on non-wilderness land for other reasons "flowing from the application of other law," such as California's legitimately enacted regulations and legislation.

* * * *

California provided Glamis with no specific assurances that the proposed Imperial Project would be exempt from any changes to California's laws and regulations. In the absence of such assurances, Glamis could not have had any reasonable expectations that California would not have adopted the challenged reclamation requirements. In any event, a reasonable investor's expectations would have been informed by the longstanding protections of Native American sacred sites by California, combined with the discovery that pre-dated Glamis's mining claims of a high concentration of prehistoric and cultural sites on the Imperial Project site. Finally, given the history of extensive regulation of the mining industry, particularly by the state of California, and the numerous indications by California that the proposed Imperial Project could be subject to backfilling requirements, a reasonable investor in Glamis's position would have had no reasonable, investment-backed expectations that California's reclamation requirements would remain static.

* * * *

IV. Glamis Has Failed To Demonstrate A Violation Of Article 1105(1)

Glamis's claim that the United States breached Article 1105(1) of the NAFTA should be dismissed. Glamis's claim is based on the mistaken premise that the measures at issue, taken separately or together, violate what Glamis contends are customary international law obligations on all States to manage their regulatory and legislative affairs in a transparent and predictable manner, to refrain from upsetting foreign investors' legitimate, investment-backed expectations, and to refrain from acting in an arbitrary or unjust manner. Glamis, however, fails to demonstrate general and consistent State practice followed from a sense of legal obligation, as is necessary to prove a rule of customary international law. Even if Glamis had shown the existence of such rules—which it has not—none of the measures at issue, alone or in combination, lacked transparency, undermined Glamis's legitimate expectations, was arbitrary, or constituted anything other than the normal exercise of regulatory and legislative decision-making in the face of complex and conflicting public interests.

Not only was the relevant government decision-making conducted in a regular and transparent manner, but also Glamis itself was one of the most active public participants in that process at every level of state and federal government. That Glamis's lobbying efforts evidently did not succeed, or that it may dislike the decisions ultimately reached by the State of California and the federal government, does not establish a breach of the NAFTA. As the *S.D. Myers* Chapter Eleven tribunal explained:

> When interpreting and applying the 'minimum standard' a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potential controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for

> errors in modern governments is through internal political and legal processes, including elections.

Glamis effectively requests that this Tribunal second-guess California's democratically established means of addressing the public interest in protecting the environment and irreplaceable, sacred Native American resources from the threat posed by open-pit cyanide heap leach mining, and the federal government's interpretation of its own regulations—a request this Tribunal lacks authority to grant. Glamis's Article 1105(1) claim should therefore be dismissed.

* * * *

A. An Article 1105(1) Claim Can Only Be Sustained When A Violation Of The Customary International Law Minimum Standard of Treatment Has Been Demonstrated.

The disputing parties agree that Article 1105(1) requires treatment in accordance with customary international law. . . .

* * * *

Sufficiently broad State practice and *opinio juris* have thus far coincided to establish minimum standards of State conduct in only a few areas. Article 1105(1) embodies, for example, the requirement to provide a minimum level of internal security and law and order, referred to as the customary international law obligation of full protection and security. Similarly, Article 1105 recognizes that a State may incur international responsibility for a "denial of justice" where its judiciary administers justice to aliens in a "notoriously unjust" or "egregious" manner "which offends a sense of judicial propriety." In addition, the most widely-recognized substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation, but that obligation is particularized in the NAFTA under Article 1110. In the absence of a customary international law rule governing State conduct in a particular area, however, a State remains free to conduct its affairs as it deems appropriate.

The burden is on the *claimant* to establish the existence of a rule of customary international law. "The party which relies on a custom . . . must prove that this custom is established in such a

manner that it has become binding on the other party." The claimant also bears the burden of demonstrating that the State has engaged in conduct that has violated that rule.

B. Glamis Has Failed To Establish That The California And Federal Measures At Issue Implicate The Minimum Standard Of Treatment

Glamis challenges two sets of California measures: (i) the amendments to the SMGB regulations, adopted on an emergency basis on December 12, 2002, and made permanent on May 30, 2003; and (ii) Senate Bill 22, passed by the California State Legislature and signed into law by Governor Davis on April 7, 2003. Glamis also challenges two aspects of the federal administrative process: (i) the 2001 Record of Decision denying its plan of operations and the 1999 M-Opinion on which that ROD was, in part, based; and (ii) the fact that its plan of operations has not been approved.

Glamis fails to establish that its claims with respect to any of these measures implicate any rule under the customary international law minimum standard of treatment. Glamis does not allege, for example, a failure to provide adequate police protection for its investment. Nor does Glamis allege that it has been denied fundamental rights of due process in a judicial or quasi-judicial proceeding. Moreover, Glamis's expropriation claim is addressed under NAFTA Article 1110. In short, Glamis has failed to identify any specific prohibition contained in Article 1105(1) that governs the actions at issue here.

* * * *

C. Glamis Fails To Show That The Standards It Alleges Were Violated Are Part Of The Customary International Law Minimum Standard Of Treatment

Glamis's Article 1105(1) claim rests on a flawed interpretation of the customary international law minimum standard of treatment. While Glamis recognizes that State practice and *opinio juris* are the two essential ingredients for a rule of customary international law to exist, Glamis consistently fails to provide any evidence in support of its allegations that certain conduct is proscribed by customary international law. Glamis fails, for example, to show any relevant State practice to support its contention that States are

obligated under international law to provide a transparent and predictable framework for foreign investment. Instead, Glamis relies on a portion of the decision in *Metalclad Corp. v. United Mexican States* that was vacated by the Supreme Court of British Columbia. That court held that in interpreting Article 1105(1), the NAFTA tribunal had "misstated the applicable law to include transparency obligations and then made its decision on the basis of the concept of transparency."

Glamis has also failed to present any evidence of relevant State practice to support its contention that Article 1105(1) imposes a general obligation on States to refrain from "arbitrary" conduct. Instead, it relies exclusively on judicial and arbitral decisions, that, when subject to scrutiny, do not support its contention. No Chapter Eleven tribunal has held that decision-making by an administrative or legislative body that appears "arbitrary" to some parties is sufficient to constitute a violation of Article 1105(1). To the contrary, NAFTA Chapter Eleven tribunals have consistently held that a high level of deference must be accorded to administrative decision-making. The [NAFTA Chapter 11] tribunal in *International Thunderbird Gaming Corp. v. United Mexican States*, for example, remarked that "the threshold for finding a violation of the minimum standard of treatment still remains high." That tribunal held that mere "arbitrary" conduct by an administrative agency is insufficient to constitute a breach of Article 1105(1); rather, the regulatory action must amount to a "*gross denial of justice* or *manifest arbitrariness* falling below international standards" in order to breach the minimum standard of treatment. In that case, the tribunal acknowledged that the administrative proceedings in question "may have been affected by certain procedural irregularities," but that the record did not establish that "the proceedings were "arbitrary or unfair, *let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment*."

Glamis's reliance on the *Elettronica Sicula (ELSI)*[*United States v. Italy*, 1989 ICJ Rep. 15] case for the proposition that Article 1105(1) prohibits "arbitrary" conduct in an administrative setting is unavailing. The *ELSI* case does not shed light on the interpretation of NAFTA Article 1105(1) or on the content of the minimum standard of treatment under customary international law.

Rather, the arguments concerning "arbitrary" conduct in that case were based on *lex specialis*: Article I of the Supplementary Agreement to the Treaty of Friendship, Commerce and Navigation between Italy and the United States, on which the relevant claims in that case were based, provides that "[t]he nationals, corporations and associations of either High Contracting Party shall not be subjected to *arbitrary* or discriminatory measures within the territories of the other High Contracting Party."

Nor does *Pope & Talbot v. Government of Canada* support Glamis's contention that mere "arbitrary" conduct violates Article 1105(1). The [NAFTA Chapter 11] tribunal in that case exceeded its authority by interpreting a general "fairness" obligation to be "additive" of the minimum standard of treatment contained in Article 1105(1), even though it recognized that "the language of Article 1105 suggests otherwise." The NAFTA Free Trade Commission expressly rejected that interpretation, stating that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Because the *Pope & Talbot* tribunal's statements regarding "arbitrary" conduct were based on its mistaken—and rejected—interpretation of Article 1105(1), that decision does not support Glamis's interpretation of Article 1105(1).

Mondev Int'l Ltd. v. United States of America and *Loewen v. United States of America* likewise do not support Glamis, as those cases both concerned judicial proceedings, and not challenges to administrative proceedings or legislation. Moreover, as the *International Thunderbird* tribunal made clear, the customary international law "standards of due process and procedural fairness applicable to administrative officials . . . [are] lower than th[ose] of a judicial process." A far wider degree of discretion is warranted with respect to the latter.

Nor does *S.D. Myers v. Canada* support Glamis's suggestion that Article 1105(1) prohibits conduct that is merely arbitrary. The tribunal in that case stated that a breach of Article 1105(1) occurs only when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is

unacceptable from the international perspective." "That determination," noted the tribunal, "must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." Thus, the tribunal found no violation of Article 1105(1) under an arbitrariness standard, despite its conclusion that "there was no legitimate environmental reason for introducing the ban" at issue.

* * * *

Glamis's interpretation of Article 1105(1), in essence, lifts one factor to be considered in an indirect expropriation claim and adopts that factor as the sole test for a violation of the minimum standard of treatment. While the minimum standard of treatment under customary international law requires compensation in the event of an expropriation, there is no such rule requiring compensation for actions that fall short of an expropriation but that frustrate an alien's expectations. Certainly, Glamis has made no showing that States refrain out of a sense of legal obligation from taking regulatory action that may frustrate an alien's expectations. Indeed, most, if not all, regulatory action is bound to upset the expectations of a portion of the populace. If States were prohibited from regulating in any manner that frustrated expectations—or had to compensate everyone who suffered any diminution in profit because of a regulation—States would lose the power to regulate.

U.S. law certainly imposes no such requirement on the U.S. government. Indeed, the minimum standard of treatment article in the United States' most recent free trade agreements, like NAFTA Article 1105(1), prescribe the minimum standard of treatment under customary international law. Those agreements were negotiated pursuant to the authority granted by the Trade Promotion Act of 2000, which explicitly recognized that "United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law," and directed the United States to negotiate agreements that:

> [do] not accord[] greater substantive rights [to foreign investors] with respect to investment protections than

> United States investors in the United States [are accorded under U.S. law], and to secure for investors important rights comparable to those that would be available under United States legal principles and practices. . . .

United States law does not compensate plaintiffs solely upon a showing that regulations interfered with their expectations, as such a showing is insufficient to support a regulatory takings claim. Tellingly, despite Glamis's heavy reliance on domestic jurisprudence throughout its Memorial, Glamis nowhere cites U.S. legal authority to support its proposition that an interference with one's expectations alone is compensable. It is inconceivable that the *minimum standard of treatment* required by international law would proscribe action commonly undertaken by States pursuant to national law.

In sum, Glamis fails to demonstrate that the standards it alleges the United States breached form part of the customary international law minimum standard of treatment. Glamis's Article 1105(1) claim thus fails as a matter of law.

* * * *

3. Litigation Challenging Constitutionality of NAFTA Binational Panel Review Provisions

On December 12, 2006, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a challenge to the binational panel review provisions of the NAFTA Implementation Act of 1993 and the U.S.-Canada Free Trade Implementation Agreement Act of 1988. *Coalition for Fair Lumber Imports v. United States*, 471 F.3d 1329 (D.C. Cir. 2006). As explained by the court, the case "arises from a trade dispute between the United States and Canada regarding softwood lumber imports" which was settled by the Softwood Lumber Agreement entered into by the United States and Canada (*see* D.4. below) after oral argument in the case, thereby removing the basis for the court's jurisdiction.

Excerpts below from the opinion explain the binational review process at issue and the disposition of the case.

---

* * * *

. . . In 2001, the Coalition for Fair Lumber Imports, an association representing U.S. lumber producers, and other interested parties petitioned the Department of Commerce seeking imposition of antidumping and countervailing duties (AD/CVDs) on Canadian softwood lumber imports. The Coalition alleged that Canadian provincial governments were unfairly subsidizing their local lumber industries by charging below-market timber fees for lumber harvested on government-owned land. Under 19 U.S.C. §§ 1671b and 1673b, antidumping and countervailing duties may be imposed only if the U.S. government makes two findings, each called a "determination." As we have previously explained in *American Coalition for Competitive Trade v. Clinton*, 327 U.S. App. D.C. 27, 128 F.3d 761 (D.C. Cir. 1997), "the Department of Commerce determines whether dumping has occurred or whether an exporting nation has provided a subsidy. If the Commerce Department finds dumping or a subsidy, the United States International Trade Commission then determines whether the importer's behavior has actually injured or threatened to injure a U.S. industry." *Id.* at 762 (citations omitted); *see also* 19 U.S.C. §§ 1671b(a), 1673b(a). In most situations, a party may seek judicial review of Commerce Department and International Trade Commission (ITC) determinations only in the U.S. Court of International Trade (CIT). 19 U.S.C. § 1516a(a)(1).

The United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988), and the North American Free Trade Agreement Implementation Act of 1993, Pub L. No. 103-182, 107 Stat. 2057 (1993), however, created an optional alternative review process for Commerce Department and ITC determinations regarding goods imported from either Canada or Mexico. Again, as we explained in *American Coalition for Competitive Trade*:

> Under this scheme, any "interested party" that appeared in the administrative proceedings before the Commerce

> Department or the International Trade Commission may request a binational panel to review the decisions those domestic agencies made. Panel members are selected by the United States and the other nation involved, with the United States Trade Representative appointing this country's panel candidates. These panels apply the substantive law of the importing country.

128 F.3d at 763 (citations omitted); *see also* 19 U.S.C. §§ 1516a(g)(8), 3432(d); North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904(2), Dec. 17, 1992, 32 I.L.M 605, 683 (hereinafter NAFTA); NAFTA Annex 1901.2, 32 I.L.M. at 687. If a binational panel rules that a determination fails to comply with U.S. law, the panel remands the matter to the agency, which "shall . . . take action not inconsistent with the decision of the panel." 19 U.S.C. § 1516a(g)(7)(A). A country may appeal a BNP decision to a binational Extraordinary Challenge Committee (ECC)—again made up of appointees from each country. *See* NAFTA art. 1904(13), 32 I.L.M. at 683; NAFTA Annex 1904.13, 32 I.L.M. at 688. BNP or ECC decisions, as well as agency actions in compliance with these decisions, are not usually reviewable by United States courts. 19 U.S.C. § 1516a(g)(2), (g)(7)(A). Critical to the issues before us, however, Congress gave this court original jurisdiction for facial constitutional challenges to the binational panel system itself:

> An action for declaratory judgment or injunctive relief, or both, regarding a determination on the grounds that any provision of . . . the North American Free Trade Agreement Implementation Act implementing the binational dispute settlement system . . . violates the Constitution may be brought only in the United States Court of Appeals for the District of Columbia Circuit, which shall have jurisdiction of such action.

19 U.S.C. § 1516a(g)(4)(A).

The softwood lumber dispute proceeded through each of these steps. . . . The Coalition then brought this action under 19 U.S.C. § 1516a(g)(4)(A), alleging that the binational panel system violates

various provisions of the U.S. Constitution, including the Due Process Clause, Appointments Clause, and Article III.

II.

After oral argument, the United States and Canada, with the Coalition's support, entered into the Softwood Lumber Agreement (SLA), pursuant to which the United States revoked its antidumping and countervailing duty orders "without possibility of reinstatement." . . .

. . . [T]he SLA deprives us of statutory jurisdiction. . . . Congress designed the BNP process as an alternative to litigation in U.S. courts. . . . With very limited exceptions, it broadly stripped the jurisdiction of courts to hear claims arising from the binational panel process. . . .

One of those exceptions is this Court's carefully circumscribed jurisdiction to hear facial constitutional challenges to the binational panel system. 19 U.S.C. § 1516(g)(4)(A). Congress provided jurisdiction to hear such constitutional claims only for an "action for declaratory judgment or injunctive relief, or both, *regarding a determination*. . . ." *Id.* (emphasis added). After the SLA, however, there is no determination left on which to hang our hat. By permanently revoking the AD/CVD orders, the SLA renders the underlying ITC determination void. . . . Absent a determination, this suit amounts to a free-standing challenge to the constitutionality of the binational panel system—a challenge Congress expressly chose not to permit. Lacking jurisdiction over such a claim, we dismiss.

The United States filed its Brief for Respondents in the case on September 25, 2006, addressing the merits of the constitutional challenge that the court did not reach. Excerpts below from section I.A. of the U.S. brief argue that comparable dispute resolution mechanisms have been used by the President and Congress for over two centuries, demonstrating the validity of the NAFTA binational dispute resolution scheme governing conflicts between sovereign states concerning tariffs. The U.S. brief also argued that the constitutional arguments raised by the Coalition were individually flawed in any event because (1) a coalition of U.S. producers has no constitutionally protected property interest in a tariff

imposed by the U.S. government on goods imported from Canada; (2) NAFTA's binational review panels are consistent with the requirements of Article III of the U.S. Constitution; (3) NAFTA panel members are not filling an office within the meaning of the constitutional Appointments Clause and therefore nothing in the binational review panel scheme violates that clause; (4) there is no constitutional doctrine prohibiting the President and Congress from agreeing to international arbitration panels to resolve disputes between the United States and foreign states; and (5) the NAFTA Act fallback mechanism is fully constitutional, as it simply grants the President discretion to decide whether or not to adopt a recommendation made by binational panels. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

1. Since its earliest days, the United States has agreed to dispute resolution mechanisms, including those in which non-U.S. arbitrators definitively resolve the claims of U.S. citizens.

For example, the Jay Treaty established two mixed claims commissions devoted to resolving individual claims by U.S. citizens and British subjects. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794 (8 Stat. 116, 118-21). Each commission consisted of two members appointed by the British King, two members appointed by the President, and a fifth selected by consent of the others or by lot (fn. omitted).

Pinckney's Treaty, concluded the following year, included a provision for resolving war-related claims by U.S. citizens against Spain, before a similarly-composed mixed commission. Treaty of Friendship, Limits and Navigation Between the United States and the King of Spain, Oct. 27, 1795 (8 Stat. 138, 150). A similar provision was included in a later treaty addressing war-related claims by individuals from either nation. Convention between His Catholic Majesty and the United States of America, Aug. 11, 1802 (8 Stat. 198, 200).

Decisions by all of these commissions were final and conclusive, with no possibility of appeal. The United States agreed to a number

of similar arrangements over the next century. In 1839, the Convention for the Adjustment of Claims between the United States and Mexico, Apr. 11, 1839 (8 Stat. 526-30), created a commission, half of whose members were appointed by Mexico, to make final decisions regarding all claims by U.S. citizens against Mexico. (If the four commissioners were split, the King of Prussia or his representative was to serve as the arbiter. *Id.* at 530.)

The Reciprocity Treaty with Great Britain, June 5, 1854 (10 Stat. 1089, 1090) established a two-person commission—with the United States and Great Britain each selecting a member, and those members to settle on an umpire—to settle conclusively the fishing rights of U.S. and Canadian fishermen. Likewise, the United States and Spain each appointed arbitrators (who were, again, themselves to select an umpire) to decide finally the claims of U.S. citizens for wrongs and injuries against their persons or property sustained in Cuba. Agreement between the United States and Spain, Feb. 12, 1871 (17 Stat. 839).

One of the best-known examples from this period was the Treaty of Washington, which addressed the so-called *Alabama* claims, establishing a mixed tribunal—with members appointed by the United States, Great Britain, Italy, Switzerland, and Brazil—to reconsider on certain points the "correctness" of prize cases, including some cases that had been decided by the Supreme Court or the House of Lords. Treaty between the United States and Great Britain, May 8, 1871 (17 Stat. 863); Moore, IV *History and Digest*, at 4057-78. This commission reached its decisions "according to justice and equity"; its decisions were accepted by the parties as conclusive.

This treaty also established a mixed commission—one member appointed by Great Britain, one by the United States, and the third conjointly or by Spain—to resolve, also conclusively, "all" private claims by U.S. or British citizens or companies arising out of other acts committed by the counterpart government "against [their] persons or property" during the period of the Civil War. 17 Stat. 867-68.

The above arrangements are merely representative; between the Jay Treaty and the onset of World War II there were at least 249 documented instances in which non-sovereign claims were

adjudicated by international tribunals, mainly by mixed commission arbitrations, and a large number involved the United States. 1 Richard B. Lillich & Burns H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* 26-27 (1975); John Bassett Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 398-417 (1905) (providing numerous additional examples).

More recently, following the Iranian hostage crisis, the Iran-U.S. Claims Tribunal was created to decide claims by U.S. nationals against Iran. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), Jan. 19, 1981, art. II, 20 I.L.M. 230 (1981). The Tribunal consists of at least nine members, one third appointed by each government and the remaining third appointed by the previously selected members, which sits in panels of three comprising one member from each method of selection. *Id*. art. III. The Tribunal's decisions are deemed to be "excluded from the jurisdiction of the courts of Iran, or of the United States, or any other court." *Id*. art. VII.

This history of reliance on international arbitration to settle disputes between the United States and other foreign states, as well as claims by U.S. citizens, is highly significant for this case. As the Supreme Court has repeatedly explained, "traditional ways of conducting government * * * give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989). See, *e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (invoking "the historical gloss on the 'executive Power' vested in Article II of the Constitution"); *Myers v. United States*, 272 U.S. 52, 175 (1926) ("[C]ontemporaneous legislative exposition of the Constitution * * * acquiesced in for a long term of years, fixes the construction to be given its provisions"); *Field v. Clark*, 143 U.S. 649, 691 (1892) ("[T]he practical construction of the constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land").

Reference to historical practice is particularly appropriate in the context of this case for two reasons.

First, the interpretation of the Constitution by the generation of that document's framers is highly instructive regarding its meaning. See *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). In this instance, as noted above, the Jay Treaty established a mechanism under which claims by U.S. citizens against the British government were conclusively resolved by a commission whose members included those selected by the King of England. That treaty was negotiated by John Jay, the first Chief Justice of the United States and one of the authors of *The Federalist Papers*; it was then pressed through the Senate by President George Washington. Under the Coalition's argument here, however, the Jay Treaty—and Pinckney's Treaty, among others—would be deemed unconstitutional on a variety of grounds.

Second, the Supreme Court has particularly relied on the practical statesmanship of the political branches when considering constitutional questions involving foreign relations. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (longstanding practice of settling citizens' claims against foreign countries by executive agreement, coupled with Congressional acquiescence, held to establish legitimacy of the practice).

Indeed, in *Dames & Moore*, the Supreme Court discussed at some length the fact that claims by the citizens of one country against another constitute sources of friction, which are often resolved by agreements to settle such claims: "[t]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries" through renunciation of claims in favor of lump sum payments or arbitration. 453 U.S. at 679. As the Supreme Court reported, "during the period 1817-1917, no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." *Id.* at 680 n.8. The Supreme Court also made clear that the existence of this power did not depend on the U.S. Government providing an alternative forum for claims by U.S. citizens. *Id.* at 687. See also *Joo v. Japan*, 413 F.3d 45, 51 (D.C. Cir. 2005) (noting the President's power to settle claims of U.S. citizens as "a necessary incident to the resolution of a major foreign policy dispute").

The NAFTA binational dispute resolution scheme involves a key element in our relations with Canada, our largest foreign trading partner. NAFTA limits our tariff laws, which are created under Congress' plenary power to regulate trade between the

United States and foreign nations, a subject over which the Supreme Court has ruled Congress exercises a high level of discretion. See U.S. Const. Art. I, Sec. 8, cl. 3. Tariffs plainly involve important questions of international relations, as they generally are imposed for reasons related to public policy. See Analysis of Judicial Review of Administrative Determinations of Antidumping and Countervailing Duties under Present Law and Under the Proposed United States-Canada Free Trade Agreement, Congressional Research Service (1988), 11-13 (reprinted in United States-Canada Free Trade Agreement: Hearing before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. of the Judiciary, 100th Cong. No. 60, 262-63 (1988) (hereafter "Judiciary Comm. Hearing")).

More specifically, NAFTA's binational dispute resolution mechanism was designed to ameliorate serious frictions between the United States, Canada, and Mexico, and amounts to a bargained-for element of an agreement among them to reconcile competing interests in the highly charged area of regulation of assertedly unfair international trade.

For example, at the time of NAFTA's negotiation, there was concern in Canada that various government regional development and social welfare programs would be considered countervailable subsidies under U.S. law, and that political pressures in the United States had made antidumping and countervailing duty determinations here unpredictable. See *Report on the Binational Review Mechanism for Antidumping and Countervailing Duty Case under the United States-Canada Free Trade Agreement*, American Bar Association Section of International Law and Practice, April 24, 1988, 5-7, reprinted in *Judiciary Comm. Hearing*, at 150-52.

From the standpoint of the United States, the binational panel mechanism was critical to affording review, on the basis of an administrative record that had not previously been available, of dumping and countervailing duty determinations that had not been reviewable in Canadian courts. *Statement of Reasons as to How the United-States Canada Free Trade Agreement Serves the Interests of U.S. Commerce*, reprinted in United States-Canada Free-Trade Agreement: Communication from the President of the

United States, H.R. Doc. No. 100-216, 100th Cong., 2d Sess. 1, 38 (1988).

Thus, the NAFTA dispute resolution mechanism is a critical aspect of the foreign affairs and foreign commerce policies of the United States, and stands in a long line of comparable agreements adopted by the President and Congress since the first days of our Republic. In passing the NAFTA Act, Congress acted with full awareness of the similar prior U.S. agreements. See *Judiciary Committee Hearing*, at 384-410 (describing history of international arbitration agreements entered into by the United States including mechanisms for multinational dispute resolutions).

Accordingly, in attacking the validity of the NAFTA Act, the Coalition asks this Court to interpret the Constitution in a manner contrary to the understanding of both the Framers and the many Presidents and Members of Congress who have negotiated and utilized like schemes in the ensuing two centuries. Notably, although these agreements have been invoked numerous times before federal courts, not one has been held unconstitutional.

3. The Coalition tries to dodge this flaw in its argument by asserting that no prior international agreement by the United States has provided for international binding arbitration before a mixed (or foreign) tribunal of legal claims by private U.S. parties with respect to their rights under U.S. law, without their consent. This contention is incorrect, and too narrowly states the actual question at issue here. Various agreements entered into by the United States have provided mixed tribunals with decisive authority to adjudicate domestic law claims of U.S. citizens, while others have applied more broadly to all claims. For example, the Convention between the United States and the Dominion of Canada, April 15, 1935 (49 Stat. 3245, 3247), established a mixed tribunal to conclusively decide claims of damage in the United States caused by the operation of a Canadian smelter, in light of the interests of "all parties concerned" and "interested parties," by applying "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice." *Ibid*.

The Agreement between the United States and Spain, Feb. 12, 1871, (17 Stat. 839), required mixed-nation arbitrators to decide Cuba-related claims of U.S. citizens "according to public law and

the treaties in force between the two countries and these present stipulations."

Further, the Convention between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868 *(*15 Stat. 679), established a mixed-nation commission to decide conclusively "[a]ll claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican republic arising from injuries to their persons or property by authorities of the Mexican republic," which had already been presented to the U.S. government for interposition with Mexico, but which remained unsettled. See *Frelinghuysen v. Key*, 110 U.S. 63 (1884).

Other mixed-nation commissions have been required to turn to U.S. or other municipal laws to determine the validity of contracts or prerequisite property rights. The Iran-United States Claims Tribunal provides a contemporary example, as it provides jurisdiction over claims and counterclaims by U.S. nationals arising out of debts or contracts, which are necessarily governed by municipal law—including, in many instances, U.S. law.

The Coalition nevertheless mistakenly attempts to depict the constitutional issue as unprecedented. The issue here is, however, not unique, as the Coalition challenges a mechanism establishing binding arbitration panels to resolve disagreements between the United States and either Canada or Mexico concerning the setting of tariffs on imported goods from those countries; these are not simply private disputes by U.S. companies or citizens concerning their rights under U.S. law, but rather are regulatory disputes that NAFTA properly assigns in part to the initiative of the state parties to this international agreement. Obviously, resolution of these disputes can have a substantial impact on private citizens or groups within the United States, such as the Coalition. But the agreements we described above also all had that effect; many of the agreements submitted traditional private-law claims to binding arbitration by mixed commissions as the sole, non-consensual recourse for claimants, or entrusted to the U.S. government the resolution of boundary, fishing, or similar questions having a direct and obvious impact on many private individuals.

Given the frequent practice of the United States—stretching from 1794 until modern times—of utilizing international binding arbitration mechanisms no different in relevant respect from the NAFTA binational dispute resolution panels, the Coalition's varied constitutional claims are wrong, and should be rejected on this ground alone. In any event, . . . those claims are individually incorrect under Supreme Court case law.

* * * *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at *www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html*.

a. WTO Disputes brought by the United States

(1) European Communities—Measures affecting the approval and marketing of biotech products (DS291, DS292 and DS293)

On September 29, 2006, a WTO panel issued a report in favor of claims by the United States, Argentina, and Canada against the European Union over its WTO-inconsistent moratorium on approving agricultural biotech products and EU member-state bans of previously approved products. A USTR press release of that date is available at *www.ustr.gov/Document_Library/Press_Releases/2006/September/Section_Index.html.* The WTO's Dispute Settlement Body ("DSB") adopted the panel report on November 21, 2006.

Excerpts follow, describing the dispute, from The President's 2006 Annual Report on the Trade Agreements Program ("2006 Annual Report") at 70, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf.*

Since the late 1990s, the EU has pursued policies that undermine agricultural biotechnology and trade in biotech foods. After approving a number of biotech products up through October 1998, the EU adopted an across-the-board moratorium under which no further biotech applications were allowed to reach final approval. In addition, six member states (Austria, France, Germany, Greece, Italy and Luxemburg) adopted unjustified bans on certain biotech crops that had been approved by the EU prior to the adoption of the moratorium. These measures have caused a growing portion of U.S. agricultural exports to be excluded from EU markets, and unfairly cast concerns about biotech products around the world, particularly in developing countries.

On May 13, 2003, the United States filed a consultation request with respect to: (1) the EU's moratorium on all new biotechnology approvals, (2) delays in the processing of specific biotech product applications, and (3) the product-specific bans adopted by six EU member states (Austria, France, Germany, Greece, Italy, and Luxembourg). The United States requested the establishment of a panel on August 7, 2003. Argentina and Canada submitted similar consultation and panel requests. On August 29, 2003, the DSB established a panel to consider the claims of the United States, Argentina and Canada. . . .

The Panel issued its report on September 29, 2006. The Panel agreed with the United States, Argentina, and Canada that the disputed measures of the EU, Austria, France, Germany, Greece, Italy, and Luxembourg are inconsistent with the obligations set out in the SPS Agreement. In particular:

- The Panel found that the EU adopted a *de facto*, across-the-board moratorium on the final approval of biotech products, starting in 1999 up through the time the panel was established in August 2003.

- The Panel found that the EU had presented no scientific or regulatory justification for the moratorium, and thus that the moratorium resulted in "undue delays" in violation of the EU's obligations under the SPS Agreement.

- The Panel identified specific, WTO-inconsistent "undue delays" with regard to 24 of the 27 pending product applications that were listed in the U.S. panel request.

- The Panel upheld the United States' claims that, in light of positive safety assessments issued by the EU's own scientists, the bans adopted by six EU member States on products approved in the EU prior to the moratorium were not supported by scientific evidence and were thus inconsistent with WTO rules.

The DSB adopted the panel report on November 21, 2006. At the meeting of the DSB held on December 19, 2006, the EU notified the DSB that the EU intends to implement the recommendations and rulings of the DSB in these disputes, and stated that it would need a reasonable period of time for implementation.

* * * *

(2) European Communities—Selected customs matters (DS315)

On May 16, 2006, a dispute settlement panel established in response to a request by the United States issued a report supporting the U.S. claim that the "administration of EC customs law by 25 different agencies (one for each of the member States), coupled with a lack of any procedures or mechanisms to reconcile the divergences that inevitably occur on important matters including classification and valuation, is a violation of the EC's obligation to administer its customs laws in a uniform manner." *See* USTR press release at *www.ustr.gov/Document_Library/Press_Releases/2006/June/Section_Index.html.* The panel report and a November 13, 2006, Appellate Body report addressing issues raised on appeal by both the United States and the European Union, were adopted by the DSB on December 11, 2006.

Excerpts follow describing the dispute from the 2006 Annual Report at 71, available at *www.ustr.gov/assets/*

Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf.

* * * *

On September 21, 2004, the United States requested consultations with the EU with respect to: (1) lack of uniformity in the administration by EU member states of EU customs laws and regulations and (2) lack of an EU forum for prompt review and correction of member state customs determinations. On September 29, 2004, the EU accepted the U.S. request for consultations, and consultations were subsequently held on November 16, 2004. . . . On June 16, 2006, the panel circulated its report, in which it found a lack of uniform administration in certain specified instances and found no breach of the EU's obligations with respect to prompt review and correction of customs determinations. The United States and EU each appealed from different aspects of the panel report. Among other grounds for appeal, the United States challenged the panel's failure to treat the U.S. complaint as a complaint regarding the EU system of customs administration as a whole (as opposed to discrete instances of administration). In its report issued on November 13, 2006, the Appellate Body agreed that the panel had misread the U.S. complaint. The Appellate Body also agreed with the United States on certain other legal points and agreed with the EU that the panel had erred in finding non-uniform administration in two particular instances. Finally, the Appellate Body agreed with the panel's finding of no breach of the EU's obligation regarding prompt review and correction of customs administrative action.

The panel and Appellate Body reports were adopted at the December 11, 2006 meeting of the DSB. The reports as adopted included a finding that the EU is in breach of its obligation of uniform administration with respect to rules pertaining to the tariff classification of certain liquid crystal display monitors. At the same DSB meeting, the EU stated that subsequent actions had eliminated this breach.

11-Cummins-Chap11.indd 740 10/22/07 11:44:36 PM

(3) China—Measures affecting imports of automobile parts (DS340)

On September 28, 2006, the United States, the European Union, and Canada requested the WTO to establish a dispute settlement panel regarding China's treatment of motor vehicle parts, components, and accessories. In a press release of that date, U.S. Trade Representative Susan C. Schwab* explained that "China's current stance leaves us no choice but to proceed with our WTO case." The full text of the press release, excerpted further below, is available at *www.ustr.gov/Document_Library/Press_Releases/2006/September/Section_Index.html*. *See also* the 2006 Annual Report at 68, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf*.

* * * *

Under China's regulations governing the importation of auto parts, all vehicle manufacturers in China that use imported parts must register with China's Customs Administration and provide specific information about each vehicle it assembles, including a list of the imported and domestic parts to be used, and the value and supplier of each part. If the number or value of imported parts in the assembled vehicle exceed specified thresholds, the regulations assess each of the imported parts a charge equal to the tariff on complete automobiles (typically 25 percent) rather than the tariff applicable to auto parts (typically 10 percent).

The regulations encourage auto manufacturers in China to use Chinese parts in the assembly process—at the expense of parts from the United States and elsewhere. The regulations also provide an incentive for auto parts producers to relocate manufacturing facilities to China.

The United States believes that these regulations impose a charge on U.S. auto parts beyond that allowed by WTO rules and

* Ambassador Susan C. Schwab was confirmed as U.S. Trade Representative on June 8, 2006.

result in discrimination against U.S. auto parts. China appears to be acting inconsistently with several WTO provisions including Article III of the General Agreement on Tariffs and Trade 1994 and Article 2 of the Agreement on Trade-Related Investment Measures, as well as specific commitments made by China in its WTO accession agreement.

The United States, Canada, and the EU held joint consultations with China in Geneva on May 11-12, 2006. Australia, Japan, and Mexico, which also export auto parts to China, participated in the consultations as third parties.

(4) Turkey—Measures affecting the importation of rice (WT/DS334)

On February 6, 2006, the United States requested the establishment of a dispute settlement panel under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") to examine import restrictions maintained by Turkey on rice from the United States. Excerpts follow, describing the dispute, from the 2006 Annual Report at 73, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf*.

* * * *

On November 2, 2005, the United States requested consultations regarding Turkey's import licensing system and domestic purchase requirement with respect to the importation of rice. By conditioning the issuance of import licenses to import at preferential tariff levels upon the purchase of domestic rice, not permitting imports at the bound rate, and implementing a *de facto* ban on rice imports during the Turkish rice harvest, Turkey appears to be acting inconsistently with several WTO agreements, including the Agreement on Trade-Related Investment Measures (TRIMS), the GATT 1994, the Agreement on Agriculture, and the Agreement on Import Licensing Procedures. Consultations were held on December 1, 2005. The United States requested the establishment of a panel on February 6, 2006, and the DSB established a panel on March 17, 2006. . . .

b. WTO disputes brought against the United States

(1) United States—Measures relating to zeroing and sunset reviews (DS322)

On September 20, 2006, a panel established in February 2005 issued a report concerning Japan's challenge to the U.S. use in antidumping administrative reviews of "zeroing" in dumping calculations. Excerpts follow, describing the dispute and its current status, from the 2006 Annual Report at 90, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf.*

On November 24, 2004, Japan requested consultations with respect to: (1) Commerce's alleged practice of "zeroing" in antidumping investigations, administrative reviews, sunset reviews, and in assessing the final antidumping duty liability on entries upon liquidation; (2) in sunset reviews of antidumping duty orders, Commerce's alleged irrefutable presumption of the likelihood of continuation or recurrence of dumping in certain factual situations; and (3) in sunset reviews, the waiver provisions of U.S. law. Japan claims that these alleged measures breach various provisions of the Antidumping Agreement and Article VI of the GATT 1994. Consultations were held on December 20, 2004. Japan requested the establishment of a panel on February 4, 2005, and a panel was established on February 28, 2005. . . .

The panel report was circulated on September 20, 2006. The panel found that there was one measure, "zeroing," that was applicable in all types of comparisons and all proceedings. The panel agreed with prior reports that zeroing in average-to-average comparisons in investigations is inconsistent with the Antidumping Agreement. However, the panel also found that zeroing in transaction-to-transaction comparisons is not inconsistent with the Antidumping Agreement, and, expressly rejecting the Appellate Body's reasoning in *US—Zeroing (EC),* also found that zeroing in assessment proceedings is not inconsistent with the

Antidumping Agreement. Japan appealed the panel report. The United States filed a cross-appeal.

(2) United States—Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") (DS217/234)

In 2001 a panel was established at the request of ten countries and the European Union regarding an amendment to the Tariff Act of 1930 that provided for transfer of import duties collected under U.S. antidumping and countervailing duty orders to the companies that filed or supported the antidumping and countervailing duty petitions ("CDSOA"). The DSB adopted panel and Appellate Body reports finding that the CDSOA was an impermissible specific action against dumping and subsidies. *See Digest 2005* at 626-27, *Digest 2004* at 606-07 and *Digest 2003* at 655-57. On February 8, 2006, President Bush signed the Deficit Reduction Act into law, Pub. L. No. 109-204, which included a provision repealing the CDSOA upon the date of enactment of the Act. The 2006 Annual Report described the current status as follows:

> Certain of the complaining parties . . . continued to impose retaliatory measures because they considered that the Deficit Reduction Act failed to bring the United States into immediate compliance. Thus, on May 1, 2006, the EU renewed its retaliatory measure and added eight products to the list of targeted imports. Japan renewed its retaliatory measure on September 1, 2006, retaining the same list of targeted imports. Mexico adopted a new retaliatory measure on September 14, 2006, imposing duties of 110% on certain dairy products through October 31, 2006. After that date, Mexico has taken no further retaliatory measures. Canada did not renew its retaliatory measures once they expired on April 30, 2006.

See 2006 Annual Report at 79, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf*.

(3) United States—Final countervailing duty determination with respect to certain softwood lumber from Canada (DS257); Final dumping determination on softwood lumber from Canada (DS264); Investigation of the U.S. International Trade Commission in softwood lumber from Canada (DS277); and Reviews of countervailing duty on softwood lumber from Canada (DS311)

On October 12, 2006, the United States and Canada informed the DSB, in accordance with Article 3.6 of the DSU, that they had reached a mutually agreed solution to these disputes. *See* 2006 Annual Report at 80-82, 85-86, and 89, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf. See also Digest 2005* at 627-32.

2. WTO Accession

a. Ukraine

On March 6, 2006, then U.S. Trade Representative Rob Portman and Ukrainian Minister of Economy Arsenly Yatensyuk signed a bilateral agreement on market access issues as part of Ukraine's WTO accession effort. A USTR press release of March 8 explained the process as follows:

> Ukraine has been negotiating its terms of accession to the General Agreement on Tariff and Trade (GATT), and then to the WTO, since 1994. Ukraine is still negotiating bilateral market access agreements with a few remaining countries. To complete its accession bid, Ukraine must complete those bilateral market access negotiations and also the multilateral negotiations on a Working Party Report and Protocol of Accession. Ukraine is also still in the process of enacting legislation that will enable it to apply WTO provisions after its accession.

Excerpts below from a USTR press release of March 6 describe the agreement. Both press releases are available at

www.ustr.gov/Document_Library/Press_Releases/2006/March/Section_Index.html.

* * * *

Ukraine's tariff commitments in the agreement include eventual duty free entry of information technology, e.g., computers and semiconductors, and aircraft products and harmonization of tariffs on chemical imports at very low or zero rates of duty.

U.S. service providers will benefit in particular from more open access in the areas of energy services, branching in banking and insurance, professional services, express delivery, and telecommunications, among others.

The bilateral agreement also addressed concerns related to specific sanitary and phytosanitary measures of priority to U.S. exporters, shelf-life standards, protection of undisclosed information for pharmaceuticals and agricultural chemicals (as required by the WTO), imports of information technology products with encryption, the operation of state owned firms based on commercial considerations, and reduction of export duties on non-ferrous and steel scrap.

Congressional action is necessary to terminate application of Jackson-Vanik to Ukraine. This will clear the way for the two countries to apply the WTO Agreement between them when Ukraine becomes a WTO member.

On March 23, 2006, President George W. Bush signed into law legislation authorizing him to terminate application of Title IV of the Trade Act of 1974, which includes the Jackson-Vanik Amendment,** to Ukraine and proclaim the extension of nondiscriminatory treatment (normal trade relations treatment) to the products of Ukraine. Pub. L. No. 109-205, 120 Stat. 313 (2006). As stated in the Findings section of the act, "Ukraine has received normal trade relations treatment since

** The Jackson-Vanik Amendment (sections 402 and 409 of the Trade Act of 1974, 19 U.S.C. §§ 2432, 2439) sets forth freedom of emigration criteria for certain countries (most Communist or formerly Communist states).

1992 and has been found to be in full compliance with the freedom of emigration requirements [of the Jackson-Vanik Amendment] since 1997." In remarks on signing the bill, President Bush explained the significance of the legislation and U.S. support for Ukraine's accession to the WTO. 42 Weekly Comp. Pres. Docs. 495 (March 24, 2006).

---

* * * *

The bill I sign today marks the beginning of a new era in our history with Ukraine. During the cold war, Congress passed the Jackson-Vanik Amendment as a response to widespread communist deprivation of human rights. The law made American trade with communist nations contingent on those countries' respect for the rights of their own people. At the time, the law served an important purpose; it helped to encourage freedom and the protection of fundamental rights and penalized nations that denied liberty to their citizens. Times have changed. The cold war is over, and a free Ukraine is a friend to America and an inspiration to those who love liberty.

The Orange Revolution was a powerful example of democracy for people around the world. . . .

Ukraine is also working to expand its market economy and produce measurable improvements in the lives of the Ukranian people.

Section 2432(a) makes a country ineligible for normal trade relations and other specific trade and investment benefits if the President determines that it

> (1) denies its citizens the right or opportunity to emigrate;
> (2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or
> (3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice . . .

A country subject to Jackson-Vanik can qualify for normal trade relations treatment if the President determines that it is in compliance with the freedom of emigration requirements enumerated in § 2432(a)(1)-(3) or exercises Presidential waiver authority (upon a determination that a waiver will substantially promote the objectives of the Amendment and upon receipt of assurances that the emigration practices of the country will lead substantially to the achievement of those objectives).

America supports these efforts, and this bill is an important step. By eliminating barriers to trade between the United States and Ukraine, the bill will help Ukraine grow in prosperity. As we've seen over the past 50 years, trade has the power to create new wealth for whole nations and new opportunities for people around the world. By expanding trade with Ukraine, this bill will open new markets for American products and help Ukrainians continue to build a free economy that will raise the standard of living for families across their land.

* * * *

These reforms have taken great conviction. And earlier this month, our two nations signed a bilateral agreement that will establish the terms of trade between our nations when Ukraine joins the World Trade Organization. We support Ukraine's goal of joining the WTO, and we will help resolve the remaining steps required for entry as quickly as possible. . . .

On March 31, 2006, President Bush issued Proclamation 7995, "To Extend Nondiscriminatory Treatment (Normal Trade Relations Treatment) to the Products of Ukraine, and For Other Purposes," in which he determined that Title IV of the 1974 Trade Act (including the Jackson-Vanik Amendment) should no longer apply to Ukraine. 71 Fed. Reg. 16,969 (April 4, 2006).

b. Vietnam

On May 31, 2006, Deputy U.S. Trade Representative Karan Bhatia and Vietnamese Deputy Minister of Trade Luong Van Tu signed a market access agreement between the United States and Vietnam to complete one of the steps in Vietnam's WTO accession process. A press release issued by USTR on that date describes the agreement as excerpted below. The full text of the press release is available at *www.ustr.gov/Document_Library/Press_Releases/2006/May/Section_Index.html*.

---

* * * *

Vietnam's tariff commitments in the agreement include membership in the Information Technology Agreement (ITA) that provides for duty-free entry of IT products such as computers and semiconductors. Vietnam has also agreed to zero duties on aircraft. Over 94 percent of U.S. exports of manufactured goods will face duties of 15 percent or less upon implementation of Vietnam's accession commitments. Approximately three-fourths of U.S. agricultural exports to Vietnam will face bound tariff rates of 15 percent or less.

U.S service providers will benefit in particular from more open access in the areas like telecommunications (including satellite services), distribution, financial services (including branching for insurance in addition to existing branching commitments with respect to banking)—and energy services. The bilateral market access agreement also addressed the application of science-based measures in regulating products that are a priority to U.S. exporters of agricultural products. Other issues that are addressed include shelf-life requirements and market access for large motorcycles and technology products with encryption. Vietnam will reduce export duties on non-ferrous and steel scrap, and eliminate WTO-prohibited industrial subsidies. Vietnam will immediately stop disbursements under the key subsidy program for Vietnam's textile and garment industries and terminate all WTO-prohibited subsidies to these industries on accession to the WTO.

Vietnam has been negotiating its terms of accession to the WTO since 1995. To complete its accession bid, Vietnam must complete multilateral negotiations on a Working Party Report and Protocol of Accession that details the changes Vietnam will make to bring its trade regime into conformity with WTO rules. Vietnam is continuing to enact and implement legislation that will enable it to apply WTO provisions after its accession. It is making rapid progress in this effort.

To effectuate the agreement, Congressional action is necessary to terminate application of the Jackson-Vanik amendment to Vietnam and authorize the granting of permanent normal trade relations (MFN) tariff treatment to products of Vietnam.

On December 29, 2006, President George W. Bush issued Proclamation 8096, granting Vietnam permanent normal trade relations. Proclamation To Extend Nondiscriminatory

Treatment (Normal Trade Relations Treatment) to the Products of Vietnam. 72 Fed. Reg. 451 (Jan. 4, 2007). Remarks by the President on signing Public Law 109-432, Tax Relief and Health Care Act of 2006, referred to in the proclamation, are available at 42 WEEKLY COMP. PRES. DOC. 2193 (Dec. 12, 2005). *See also* Memorandum for the Secretary of State from the President, also issued December 29, 2006, finding "that the furnishing of defense articles and defense services to Vietnam will strengthen the security of the United States and promote world peace," 72 Fed. Reg. 1903 (Jan. 16, 2007). Vietnam became a WTO member on January 11, 2007. Excerpts follow from Proclamation 8096.

---

1. Vietnam has demonstrated a strong desire to build a friendly and cooperative relationship with the United States and has been found to be in full compliance with the freedom of emigration requirements under title IV of the Trade Act of 1974 (the "1974 Act") (19 U.S.C. 2431 et seq.).

2. Pursuant to section 4002 of H.R. 6111, signed on December 20, 2006, I hereby determine that chapter 1 of title IV of the 1974 Act (19 U.S.C. 2431-2439) should no longer apply to Vietnam. NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to section 4002 of Public Law 109-432 do proclaim that:

1. Nondiscriminatory treatment (normal trade relations treatment) shall be extended to the products of Vietnam, which shall no longer be subject to chapter 1 of title IV of the 1974 Act.

2. The extension of nondiscriminatory treatment to the products of Vietnam shall be effective as of the date of signature of this proclamation.

3. All provisions of previous proclamations and Executive Orders that are inconsistent with this proclamation are superseded to the extent of such inconsistency.

* * * *

c. Russia

On November 19, 2006, U.S. Trade Representative Susan C. Schwab and Russian Minister of Trade and Economic Development German Gref signed the U.S.-Russia market access agreement as part of the bilateral process in moving toward Russia's accession to the WTO. Excerpts below from a USTR press release of that date describe the agreement. The press release and links to side letters and related fact sheets are available at *www.ustr.gov/Document_Library/Press_Releases/2006/November/Section_Index.html.*

* * * *

The bilateral agreement will create significant new opportunities for U.S. producers and exporters of industrial and agricultural goods, as well as U.S. services providers, when it enters into effect. The agreement also provides for the immediate implementation of some market opening actions for industrial and agricultural goods. The agreement resolves long-standing bilateral issues related to trade in agricultural goods, and also puts in place a strong and enforceable bilateral blueprint for protection and enforcement of intellectual property rights (IPR). Implementation of the commitments on IPR, agriculture, and industrial goods will be essential to completing the final multilateral negotiations on the overall accession package.

* * * *

Russia's tariff commitments include participation in the Information Technology Agreement (ITA), which will result in the duty-free entry of IT products, such as computers and semiconductors. Russia has also agreed to substantially reduce its tariffs on both wide body and narrow body civil aircraft and parts. Tariffs on chemical products are harmonized at 5.5 and 6.5 percent, in accordance with the Chemical Tariff Harmonization Agreement, and Russia will reduce tariffs on construction and agricultural

equipment, scientific equipment, and medical devices. Russia's tariffs, when fully implemented, will average 5 percent in these sectors. And Russia's overall bound tariff rate on industrial and consumer products will average around 8 percent.

With respect to other non-tariff barriers, the agreement sets out an understanding on procedures for importing technology products with encryption (such as mobile phones, operating systems, and other products). In addition, Russia will reduce export duties on ferrous (steel) scrap and eliminate its export duty on copper cathode.

Russia has undertaken market access and national treatment commitments in a wide array of commercially significant services sectors. U.S service suppliers will benefit, in particular, from more open access in infrastructure services sectors such as telecommunications (including satellite services), computer and related services, express delivery, distribution, financial services and audio visual services.

The bilateral market access agreement also includes important provisions that will strengthen IPR protection in Russia. Under the terms of the agreement, Russia will take action, starting immediately, to address piracy and counterfeiting and further improve its laws on IPR protection and enforcement, both stated priorities of the Russian Government, which has confirmed its commitment to implementing this agreement. The agreement also sets the stage for further progress on IPR issues in the ongoing multilateral negotiations.

. . . [F]or U.S. farmers, ranchers, businesses and investors to enjoy the benefits of many of Russia's commitments, Congress will need to enact legislation terminating application of the Jackson-Vanik amendment to Russia and authorizing the grant of permanent normal trade relations (PNTR) to Russia.

Russia has been negotiating its terms of accession to the WTO, and previously the General Agreement on Tariffs and Trade 1947 (GATT), since 1993. The next step in Russia's accession process is completion of multilateral negotiations on a Working Party Report and Protocol of Accession that details the changes Russia will make to bring its trade regime into conformity with WTO rules.

3. Doha Development Agenda

On July 28, 2006, the WTO General Council supported a recommendation by WTO Director-General Pascal Lamy to suspend the current Doha negotiations. A WTO news item stated:

> The Director-General, as chairman of the Trade Negotiations Committee, reported on his consultations to facilitate and catalyze an agreement among Members. In his report, he said that there were no significant changes in the negotiators' positions and the gaps remained too wide. Faced with this situation, the Director-General recommended that the only course of action available was to suspend the negotiations across the Round as a whole to enable the serious reflection by participants which was clearly necessary.
>
> In their statements, members agreed with this assessment and endorsed the Director-General's recommendation. . . . They agreed that a time of reflection was needed but they also expressed the hope that this "time-out" would be temporary and short since there was a need to put the negotiations back on track as soon as possible. They also said that we should preserve the achievements of the negotiation so far and build upon them rather than unravel them. There was a general agreement on the need not to modify the mandate or split it allowing for selective progress.

The news item and related information are available at *www.wto.org/english/news_e/news06_e/gc_27july06_e.htm*.

On July 24, 2006, USTR released a Doha fact sheet, "What They are Saying," noting, among other things, that "[w]hile some in the European Union are trying desperately to pin the blame for the Doha stalemate on the United States for being 'too ambitious,' the failure lies with a divided EU that was unable to reach consensus on opening their highly-protected agricultural markets." A more extensive fact sheet outlining U.S. proposals was released on the same day. The full texts

of the fact sheets are available at *www.ustr.gov/WTO/Doha_Development_Agenda/Fact_Sheets/Section_Index.html*.

D. OTHER TRADE AGREEMENTS AND RELATED ISSUES

1. U.S.-EU Agreements

a. Agricultural and industrial products

On March 22, 2006, in Geneva, Ambassador Peter Allgeier, U.S. Permanent Representative to the WTO, and Ambassador Carlo Trojan, European Commission Permanent Representative to the WTO, signed a bilateral enlargement compensation agreement in the form of an exchange of letters. As explained in a USTR press release of that date:

> On May 1, 2004, Estonia, Latvia, Lithuania, Poland, Slovakia, the Czech Republic, Slovenia, Hungary, Cyprus and Malta acceded to the European Union. The 10 new members were required to change their tariff schedules to conform to the EU's common external tariff schedule, resulting in increased tariffs on certain imported products. The United States negotiated with the EU, under General Agreement on Tariffs and Trade 1994 (GATT 1994) Articles XXIV:6 and XXVIII, for changes to offset certain of the tariff increases. The expansion of EU quotas to account for the addition of 10 new countries and more than 75 million new EU consumers was another key element of the negotiations. The agreement reduces several agricultural and industrial tariffs to offset tariff increases that the EU implemented as a result of EU enlargement from 15 to 25 members and gives the United States access to expanded tariff-rate quotas for a broad range of agricultural products,

The press release enumerated key elements as follows:

> • The EU will open new country-specific tariff-rate quotas for U.S. exports of boneless ham, poultry, and corn gluten meal.

- The EU will expand existing global tariff rate quotas for food preparations, fructose, pork, rice, barley, wheat, maize, preserved fruits, fruit juices, pasta, chocolate, pet food, beef, poultry, live bovine animals and sheep, and various cheeses and vegetables.

- The EU will permanently reduce tariffs on protein concentrates, fish (hake, Alaska Pollack, surimi), chemicals (polyvinyl butyral), aluminum tube, and molybdenum wire.

- The United States will also benefit from the Most-Favored Nation concessions that third countries such as China, Japan, Brazil, Canada, and Australia are negotiating with the EU.

The full text of the press release is available at *www.ustr.gov/Document_Library/Press_Releases/2006/March/Section_Index.html*. The exchange of letters is available at *www.ustr.gov/assets/World_Regions/Europe_Middle_East/asset_upload_file577_9158.pdf*. Publication in the Official Journal of the European Union required for implementation occurred on March 20, 2006, with an effective date of March 21, 2006. Council Regulation (EC) No 711/2006, available at *www.ustr.gov/assets/World_Regions/Europe_Middle_East/Europe/EU_Enlargement/asset_upload_file289_9453.pdf*.

b. Services

On September 25, 2006, U.S. Trade Representative Susan Schwab announced the U.S.-EU agreement on compensation for modifications to the EU's WTO services commitments, stating:

> This agreement demonstrates the value of the multilateral process and how the U.S. and other WTO Members continue to work constructively together in that forum. . . . This is the first time that any WTO Member has used the procedures for modifying GATS commitments. Over the last three years we have worked cooperatively with

> Canada, Hong Kong, Brazil, Japan, and the other 16 affected Members to make these untested, complex procedures work. . . .
>
> The press release, available at *www.ustr.gov/Document_Library/Press_Releases/2006/September/Section_Index.html*, provided further background as excerpted below.

---

* * * *

The EU requested modifications to its commitments under the GATS resulting from the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, and the Kingdom of Sweden to the European Communities. Each of these countries had previously undertaken commitments individually under the GATS. In harmonizing their individual commitments with those of the EU as a whole, they had to modify their laws and regulations in a way inconsistent with prior commitments.

Similar to the General Agreement on Tariffs and Trade (GATT) 1994, the GATS allows Members to modify or withdraw commitments, provided that they negotiate offsetting compensation such that the overall level of market access remains the same. The Member modifying its schedule must negotiate the specific form of compensation with the Members affected by the change. In this case, negotiations for compensation focused on new commitments to effectively rebalance the overall market access commitments of the EU.

The agreed compensation package contains new commitments on telecommunications that provide important clarity concerning the coverage of all basic and value-added telecommunication services. In addition, the compensation package provides new or enhanced commitments in several other sectors, including public utilities, engineering, computer, advertising, and financial services.

c. Wine

On March 10, 2006, then U.S. Trade Representative Rob Portman and EU Commissioner for Agriculture and Rural Development Mariann Fischer Boel signed a bilateral agreement on wine-making practices and labeling of wine. A USTR press release of that date explained:

> Since 1983, the EU has been renewing short-term derogations from their regulations of U.S. wine made using practices not recognized by the EU. The temporary nature of these derogations created continuous uncertainty for U.S. wine exporters. This wine agreement is intended to replace these derogations and provide stable market conditions for the wine sector.

See www.ustr.gov/Document_Library/Press_Releases/2006/March/Section_Index.html. The press release described the agreement, which was effective immediately, as providing for

> 1) mutual recognition of existing current wine-making practices; 2) a consultative process for accepting new wine-making practices; 3) the United States limiting the use of certain "semi-generic" terms in the U.S. market; 4) the EU allowing under specified conditions for the use of certain regulated terms on U.S. wine exported to the EU; 5) recognizing certain names of origin in each other's market; 6) simplifying certification requirements; and 7) defining parameters for optional labeling elements of U.S. wines sold in the EU market.

2. U.S.-Mexico

a. Tequila

On January 17, 2006, then U.S. Trade Representative Rob Portman and Mexican Secretary of Economy Sergio Garcia de Alba signed an agreement on tequila trade. In a USTR press

release of that date, Ambassador Portman explained that "Mexico's initial position, which would have required that all Mexican-made tequila be bottled in Mexico, threatened the huge investments by U.S. companies in building bottling plants and developing brands in the United States." The press release, available at *www.ustr.gov/Document_Library/Press_Releases/2006/January/Section_Index.html,* explained further:

> . . . In 2003, Mexico considered amending the Official Mexican Standard for Tequila to require that tequila be bottled in Mexico. Such an amendment would have created a *de facto* ban on exports of bulk tequila. The United States and Mexico entered into discussions with a view to reaching a negotiated solution, resulting in today's agreement. On January 6, 2006, Mexico published the new Official Mexican Standard for Tequila, which contains prohibitive requirements related to the inspection of bottling facilities, labeling of tequila and products containing tequila, and formulation of products that contain tequila. As a result of today's agreement, these provisions do not apply to the United States.

b. Cement

On March 6, 2006, then U.S. Trade Representative Portman, Secretary of Commerce Carlos Gutierrez, and Mexico's Secretary of Economy Sergio Garcia de Alba signed an agreement to promote bilateral trade in cement. A USTR press release of that date described the agreement as excerpted below. *See www.ustr.gov/Document_Library/Press_Releases/2006/March/Section_Index.html*.

---

* * * *

The agreement makes possible increased imports of Mexican cement, encourages U.S. cement exports to Mexico and settles outstanding litigation. The Agreement also responds to concerns by

consumers and builders, notably those now rebuilding the Gulf Coast communities devastated by last summer's hurricanes.

Background

The Agreement provides for the resolution of all outstanding litigation pending under the WTO and NAFTA in connection with an antidumping order on Mexican cement. For each of the next three years, up to 3 million metric tons of Mexican cement, distributed regionally throughout the southern tier of the United States may be imported at an antidumping duty of $3 per metric ton. Should the President determine that a natural disaster warrants, additional cement up to 200,000 metric tons, may be imported at that same duty rate. The antidumping duty order will be revoked at the conclusion of the agreement.

3. Trade and Investment Instruments

Information on trade and investment instruments, including texts of agreements, is available at *www.ustr.gov/Trade_Agreements/TIFA/Section_Index.html.*

a. Mauritius

On September 18, 2006, Deputy U.S. Trade Representative Karan Bhatia and Mauritian Foreign Affairs, International Trade, and Cooperation Minister Madan Murlidhar Dulloo signed a Trade and Investment Framework Agreement ("TIFA") strengthening and expanding trade ties between the United States and Mauritius. As explained in a press release of that date, "[t]he TIFA will provide a formal mechanism to address bilateral trade issues and will help enhance trade and investment relations between the United States and Mauritius." *See www.ustr.gov/Document_Library/Press_Releases/2006/September/Section_Index.html.* The press release explained further:

> The TIFA provides a mechanism for a more comprehensive trade and investment dialogue in which the two countries can explore common objectives and review

possibilities for improving trade relations between the United States and Mauritius. Under the TIFA, a United States-Mauritius Trade and Investment Council will be formed to address a wide range of subjects, including trade promotion and development, export diversification, trade capacity building, intellectual property, labor, investment, and environmental issues. The Council will establish an ongoing dialogue that will help increase commercial and investment opportunities by identifying and working to remove impediments to trade and investment flows between the United States and Mauritius.

b. ASEAN

On August 25, 2006, U.S. Trade Representative Susan Schwab signed a TIFA with leaders of the Association of Southeast Asian Nations ("ASEAN") in Kuala Lumpur, Malaysia. A joint media statement released on that date by the ASEAN Economic Ministers and Ambassador Schwab described the TIFA as excerpted below. The full texts of the joint media statement and a USTR press release of that date are available at *www.ustr.gov/Document_Library/Press_Releases/2006/August/Section_Index. html*.

---

* * * *

2. . . . Under the TIFA, [the Ministers] will establish a formal dialogue to address issues between them, to coordinate on regional and multilateral trade issues, and to undertake a Work Plan that will support regional integration and help build on the already strong trade and investment ties between them. . . .

3. The Ministers agreed that at the initial stage the Work Plan will include initiatives to support the development of the ASEAN Single Window, which will facilitate the flow of goods within ASEAN and between ASEAN and the United States. It also will include cooperation on sanitary and phytosanitary (SPS) issues to foster additional trade in specific agricultural goods as well as

cooperation on pharmaceutical regulatory issues aimed at speeding the delivery of innovative medicines to ASEAN countries.

4. A Joint Council on Trade and Investment will be formed under the TIFA to provide direction on the implementation of the TIFA and the Work Plan. The TIFA supports the objectives laid down in the Enterprise for ASEAN Initiative ("EAI") announced by U.S. President George W. Bush in October 2002 and the ASEAN-U.S. Enhanced Partnership, signed by the Foreign Ministers of ASEAN and the U.S. Secretary of State in Kuala Lumpur on 27 July 2006.

* * * *

c. Other TIFAs

During 2006 the United States also signed TIFAs with (1) Cambodia (*see* press release of July 14, 2006, available at *www.ustr.gov/Document_Library/Press_Releases/2006/July/Section_Index.html*); (2) Rwanda (*see* USTR press release of June 7, 2006, at *www.ustr.gov/Document_Library/Press_Releases/2006/June/Section_Index.html);* and (3) Lebanon (*see* press release of November 30, 2006, at *www.ustr.gov/Document_Library/Press_Releases/2006/November/Section_Index.html*).

d. Switzerland

On May 25, 2006, then U.S. Trade Representative Rob Portman and Swiss Federal Councillor Joseph Deiss signed the U.S.-Switzerland Trade and Investment Cooperation Forum Agreement. The forum is established to "discuss bilateral trade and related issues and examine ways to strengthen" the economic relationship between the two countries. *See* USTR press release at *www.ustr.gov/Document_Library/Press_Releases/2006/May/Section_Index.html.* The text of the agreement is available at *www.ustr.gov/assets/World_Regions/Europe_Middle_East/Europe/asset_upload_file59_9466.pdf.*

4. U.S.-Canada Agreement on Softwood Lumber Trade

On September 12, 2006, U.S. Trade Representative Susan Schwab and Canadian Minister for International Trade David Emerson signed the Softwood Lumber Agreement in Ottawa. The agreement entered into force on October 12, 2006. A USTR press release of that date stated that with its entry into force,

> both the United States and Canada will begin to implement their obligations under the agreement. For Canada, based on current market prices for softwood lumber, this will require the immediate collection of an export tax. With respect to the United States, this will result in revocation of the antidumping and countervailing duty orders on softwood lumber from Canada, an end to the collection of duty deposits on imports of Canadian softwood lumber, and the initiation of the process to refund duty deposits currently held by U.S. Customs and Border Protection.

The press release provided information on the background of the agreement, as excerpted below. The October 12 press release is available at *www.ustr.gov/Document_Library/Press_Releases/2006/October/Section_Index.html*. *See also* B.2. above discussing constitutional challenge to binational review panels under the NAFTA Implementation Act.

---

* * * *

. . . Since [the signing of the agreement on September 12, 2006], the United States and Canada have worked to amend and clarify certain aspects of the agreement's text in order to be able to bring the agreement into force today.

Consistent with the terms of the Agreement, as amended, the United States and Canada will end a large portion of the litigation over trade in softwood lumber, and unrestricted trade will occur in favorable market conditions. When the lumber market is soft, as it is currently, Canadian exporting provinces can choose either to

collect an export tax that ranges from 5 to 15 percent as prices fall or to collect lower export taxes and limit export volumes. The agreement also includes provisions to address potential Canadian import surges, provide for effective dispute settlement, distribute the antidumping and countervailing (anti-subsidy) duty deposits currently held by the United States, and discipline future trade cases. . . .

> The Agreement also called for the creation of working groups to implement the Agreement and discuss provincial policy reforms.
>
> With respect to the disbursement of duty deposits that were being held by U.S. Customs and Border Protection, the Agreement provided that all of the deposits, approximately $5.5 billion, would be returned to the importers of record. In addition, Canada agreed to pay $500 million to the members of the Coalition for Fair Lumber Imports, the petitioners in the antidumping and countervailing duty cases; $50 million to a binational industry council; and $450 million to promote meritorious initiatives in the Untied States. The press release explained that "[t]he three meritorious initiatives identified by the agreement include: (1) assistance for timber-reliant communities; (2) low-income housing and disaster relief and; (3) promotion of sustainable forest management practices."
>
> The text of the agreement as signed is available at *www.ustr.gov/assets/World_Regions/Americas/Canada/asset_upload_file847_9896.pdf.* The amendments referred to in the press release were signed on October 12, 2006, and are available at *www.ustr.gov/assets/World_Regions/Americas/Canada/asset_upload_file667_9897.pdf. See also Digest 2005* at 596-632 for discussion of certain of the cases covered by the Settlement of Claims Agreement.

5. Free Trade Agreements

Texts and related materials concerning individual trade agreements are available on the website of the U.S. Trade Representative, at *www.ustr.gov/Trade_Agreements/Section_Index.html.*

a. Central America-Dominican Republic Free Trade Agreement

During 2006 the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") entered into force between the United States and four countries: El Salvador as of March 1 (Presidential Proclamation 7987, 71 Fed. Reg. 10,827 (Mar. 2, 2006)); Honduras and Nicaragua as of April 1 (Presidential Proclamation 7996, 71 Fed. Reg. 16,971 (April 4, 2006)); and Guatemala as of July 1 (Presidential Proclamation 8034, 71 Fed. Reg. 38,509 (July 6, 2006)). In each case the Presidential proclamation amended the Harmonized Tariff Schedule of the United States and took other steps necessary to implement the CAFTA-DR for each country. *See also* corrections at 71 Fed. Reg. 25,251 (April 28, 2006).

b. Colombia

On November 22, 2006, Deputy U.S. Trade Representative John Veroneau and Colombian Minster of Trade, Industry, and Tourism Jorge Humberto Botero signed the United States-Colombia Trade Promotion Agreement. A USTR press release of that date is excerpted below and available at *www.ustr.gov/Document_Library/Press_Releases/2006/November/Section_Index.html*.

---

* * * *

Upon implementation of this agreement, over eighty percent of U.S. exports of consumer and industrial products to Colombia will become duty-free immediately. Additionally, U.S. farm exports to Colombia such as high quality beef, cotton, wheat, soybeans and soybean products, fruits and vegetables will receive immediate duty-free treatment. The agreement will remove barriers to U.S. service providers doing business in Colombia; provide a secure, predictable legal framework for U.S. investors; protect intellectual property rights; and provide for effective enforcement of labor and environmental laws.

* * * *

11-Cummins-Chap11.indd 764 10/22/07 11:44:39 PM

The United States has significant economic ties with Colombia. . . .

Colombian President Uribe has made strengthening the rule of law and protecting human rights focuses of his administration. Investigative and prosecutorial functions of the criminal justice system have been strengthened to address the violence against trade unionists. Colombia also signed a historic tripartite agreement with the International Labor Organization (ILO) for a presence in Colombia through the establishment of a permanent ILO office.

c. Panama

On December 19, 2006, the United States and Panama announced that they had completed negotiations on a free trade agreement "with the understanding that it is subject to further discussion regarding labor." *See* USTR press release of that date, available at *www.ustr.gov/Document_Library/Press_Releases/2006/December/Section_Index.html*. The press release stated further on one aspect of the agreement

> Ground-breaking provisions on customs administration will enhance the transparency and efficiency of trade between the United States and Panama. For example, the agreement establishes a monitoring program for Panama's free trade zones that will help guard against circumvention of customs rules. Important provisions on trade security will facilitate secure and reliable trade in goods all over the world that pass through Panama.

d. Implementation of agreements with Bahrain and Oman

On July 27, 2006, President Bush issued Proclamation 8039, "To Implement the United States-Bahrain Free Trade Agreement ['USBFTA'], and for Other Purposes." 71 Fed. Reg. 43,635 (Aug. 1, 2006). As noted in the proclamation, the USBFTA was approved by the Congress in January 2006 in

the USBFTA Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581, 19 U.S.C. § 3805 note. The proclamation amends the Harmonized Tariff Schedule of the United States ("HTS") and takes other steps necessary to implement the U.S.-Bahrain FTA as of August 1, 2006.*

On September 26, 2006, President George W. Bush signed into law the United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, 120 STAT. 1191 (2006). *See* USTR press release of that date available at *www.ustr.gov/Document_Library/Press_Releases/2006/September/Section_Index.html*. The agreement was signed on January 19, 2006; it had not entered into force at the end of the year.

e. Other developments

During 2006 the United States indicated its intention to negotiate free trade agreements with South Korea and Malaysia. *See* announcement of February 2, 2006, by President Bush concerning South Korea, 42 Weekly Comp. Pres. Docs. 177 (Feb. 3, 2006); and letter of March 8, 2006, notifying Congress of the President's intention to initiate negotiations for a free trade agreement with Malaysia, available at *www.ustr.gov/Trade_Agreements/Bilateral/Malaysia_FTA/Section_Index.html*.

A free trade agreement with Morocco entered into force on January 1, 2006. *See* USTR press statement of December 19, 2005, available at *www.ustr.gov/Document_Library/Press_Releases/2005/December/Section_Index.html*.

f. Special 301 program

On April 28, 2006, then U.S. Trade Representative Rob Portman announced the results of the 2006 Special 301 annual review, which examined in detail the adequacy and effectiveness of

* Proclamation 8039 also makes certain changes to modify the rules of origin under the U.S.-Singapore Free Trade Agreement to reflect agreed modifications by the two countries.

11-Cummins-Chap11.indd 766 10/22/07 11:44:40 PM

intellectual property protection in 87 countries. *See* press release at *www.ustr.gov/Document_Library/Press_Releases/2006/April/Section_Index.html*. Excerpts below from The President's 2006 Annual Report on the Trade Agreements Program describe the Special 301 program and the 2006 results. *See* 2006 Annual Report at 215-18, available at *www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file278_10622.pdf*.

. . . Publication of the Special 301 lists indicates those trading partners whose intellectual property protection regimes most concern the United States, and alerts those considering trade or investment relationships with such countries that their intellectual property rights (IPR) may not be adequately protected. Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994), USTR must identify those countries that deny adequate and effective protection for IPR or deny fair and equitable market access for persons that rely on intellectual property protection. Countries that have the most onerous or egregious acts, policies or practices and whose acts, policies or practices have the greatest adverse impact (actual or potential) on relevant U.S. products are designated as "Priority Foreign Countries" unless they are entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of IPR. USTR may identify a trading partner as a Priority Foreign Country or remove such identification whenever warranted. Priority Foreign Countries are subject to an investigation under the Section 301 provisions of the Trade Act of 1974, unless USTR determines that the investigation would be detrimental to U.S. economic interests.

In addition, USTR has created a Special 301 "Priority Watch List" and "Watch List." Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Countries placed on the Priority Watch List are the focus of increased bilateral attention concerning problem areas.

Additionally, under Section 306, USTR monitors a country's compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to satisfactorily implement an agreement.

a. 2006 Special 301 Review Announcements

. . . USTR placed 48 countries on the Priority Watch List, Watch List or the Section 306 monitoring list.

China remained a top IPR enforcement priority in 2006, and was placed on the Priority Watch List. USTR announced that it would maintain heightened scrutiny of China, step up consideration of its WTO dispute settlement options, and for the first time scrutinize IPR protection and enforcement at China's provincial level by conducting a special provincial review in the coming year. The China section of the report recognized China's efforts to address IPR problems but concluded that IPR infringements throughout China remained at unacceptable levels.

Russia also continued to be a serious concern and was placed on the Priority Watch List. The Russia section of the report noted that although Russia had taken some steps to curb pirated production of optical discs in factories, particularly those located on government-owned property, high levels of IPR infringement remained, particularly infringements connected with Russia-based optical disc plants and websites.

Countries on the Priority Watch List do not provide an adequate level of IPR protection, enforcement or market access for persons relying on intellectual property protection. In addition to China and Russia, eleven countries were placed on the Priority Watch List in 2006: Argentina, Belize, Brazil, Egypt, India, Indonesia, Israel, Lebanon, Turkey, Ukraine, and Venezuela.

Thirty-four trading partners were placed on the lower level Watch List, meriting bilateral attention to address underlying IPR problems. The Watch List countries were: the Bahamas, Belarus, Bolivia, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, the Dominican Republic, Ecuador, the European Union, Guatemala, Hungary, Italy, Jamaica, Kuwait, Latvia, Lithuania, Malaysia, Mexico, Pakistan, Peru, the Philippines, Poland, the Republic of Korea, Romania, Saudi Arabia, Taiwan, Tajikistan,

11-Cummins-Chap11.indd 768 10/22/07 11:44:40 PM

Thailand, Turkmenistan, Uzbekistan and Vietnam. Paraguay remains under Section 306 monitoring.

Due to progress on intellectual property, the status of several countries in the 2006 Special 301 report improved in comparison to the 2005 report. In January 2006, Ukraine was moved from the Priority Foreign Country list to the Priority Watch List. In February, the Philippines was moved from the Priority Watch List to the Watch List. In conjunction with release of the 2006 report, USTR announced that Kuwait and Pakistan were also being moved from the Priority Watch List to the Watch List. Four countries were removed from the Watch List entirely because of improvement in intellectual property protection: Azerbaijan, Kazakhstan, the Slovak Republic and Uruguay.

The 2006 Special 301 report also announced five out-of-cycle reviews involving Canada, Chile, Indonesia, Latvia and Saudi Arabia. Out-of-cycle reviews are conducted on countries that warrant further review before the next Special 301 report and may result in changes to a country's listing. On November 6, 2006, USTR announced that Indonesia's status would be improved by moving Indonesia from the Priority Watch List to the Watch List because of improvements in its intellectual property regime. USTR will continue to work with Indonesia on further strengthening of its intellectual property system.

* * * *

E. COMMUNICATIONS

1. Global Internet Freedom Task Force

On February 14, 2006, Secretary of State Condoleezza Rice established a new Global Internet Freedom Task Force. A media note issued by the Department of State on that date is excerpted below and available in full at *www.state.gov/r/pa/prs/ps/2006/61156.htm*.

---

* * * *

. . . Nearly six decades ago, the Universal Declaration of Human Rights recognized, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Governments reaffirmed these rights in 2003 and 2005 at the UN's World Summit on the Information Society.

- The task force will consider foreign policy aspects of Internet freedom, including:
- The use of technology to restrict access to political content and the impact of such censorship efforts on U.S. companies;
- The use of technology to track and repress dissidents; and
- Efforts to modify Internet governance structures in order to restrict the free flow of information.

Consistent with existing interagency and advisory institutions and processes, the task force will focus the State Department's coordination with other agencies, U.S. Internet companies, nongovernmental organizations, academic researchers, and other stakeholders. . . .

See also remarks on February 14 by Under Secretary of State for Economic, Business and Agricultural Affairs Josette Sheeran and Under Secretary for Democracy and Global Affairs Paula Dobriansky, available at *www.state.gov/e/eeb/rls/rm/2006/61182.htm.*

2. Amendments to the Constitution and Convention of the International Telecommunication Union

On July 10, 2006, President Bush transmitted to the Senate for advice and consent to ratification the Amendments to the Constitution and Convention of the International Telecommunication Union (Geneva, 1992), as amended by the Plenipotentiary Conference (Kyoto, 1994) and the Plenipotentiary Conference (Minneapolis, 1998), together with the Declarations

and Reservations by the United States, all as contained in the Final Acts of the Plenipotentiary Conference (Marrakesh, 2002). S. Treaty Doc. 109-11. Excerpts from the President's letter and the declarations and reservations, as submitted by the Secretary of State to the President on May 16, 2006, follow. The text of the Final Acts of the Plenipotentiary Conference (Marrakesh, 2002) is also included in S. Treaty Doc. 109-11. *See also* Chapter 10.D.1. for discussion of amendment concerning privileges and immunities for members of the Radio Regulations Board.

---

* * * *

The Plenipotentiary Conference (Marrakesh, 2002) adopted amendments that would expand the field of individuals eligible for election to the Radio Regulations Board; provide for functional privileges and immunities for members of the Radio Regulations Board; strengthen the finances of the International Telecommunication Union by, among others, providing for sector member contributions to defray the expenses of regional conferences in which they participate and clarifying that operational plans prepared by the International Telecommunication Union Secretary-General and Directors of each of the International Telecommunication Union sectors must reflect the financial implications of the activities proposed; provide for sector members to be represented as observers at meetings of the Council; and recognize the authority of the Radiocommunication Assembly, the World Telecommunication Standardization Assembly, and the World Telecommunication Development Conference to adopt working methods and procedures for their respective sectors.

* * * *

Declarations and Reservations

ITU practice provides for declarations and reservations to be submitted by governments prior to signature of the instruments to be adopted at a particular conference. In 2002, the United States submitted five declarations and reservations that are included in the 2002 Final Acts. The United States also reserved the right to make additional reservations or declarations at the time of deposit

of its instruments of ratification of the amendments adopted by the Plenipotentiary Conference. See No. 70 found on page 88 of the Final Acts. The five declarations and reservations made by the United States require Senate advice and consent to ratification.

Consistent with long-standing U.S. practice at ITU treaty-making conferences, the first of these declarations and reservations (No. 70) incorporates by reference declarations and reservations from previous conferences. It also reiterates the long-standing U.S. position that the United States can only be considered bound by instruments adopted at an ITU Conference once it officially notifies the ITU of its consent to be bound. The relevant text reads as follows:

> The United States of America reiterates and incorporates by reference all reservations made at world administrative conferences and world radiocommunication conferences prior to signature of these Final Acts.
>
> The United States does not by signature to or by any subsequent ratification of the amendments to the Constitution and Convention adopted by the Plenipotentiary Conference (Marrakesh, 2002) consent to be bound by the Administrative Regulations adopted prior to the date of signature of these Final Acts. Nor shall the United States of America be deemed to have consented to be bound by revisions to the Administrative Regulations, whether partial or complete, adopted subsequent to the date of signature of these Final Acts, without specific notification to the International Telecommunication Union of its consent to be bound.

The second of these declarations and reservations (No. 71), states the manner in which the United States intends to implement the provision that requires that Member States, consistent with their respective national laws, grant members of the Radio Regulations Board functional privileges and immunities that are equivalent to those granted to the elected officials of the ITU. It reads as follows:

> In regard to the privileges and immunities to be extended pursuant to ADD No. 142A of Article 10 of the Convention

> of the International Telecommunication Union, the United States of America shall provide members of the Radio Regulations Board with functional privileges and immunities that are equivalent to those accorded to officials of international organizations that are designated under the International Organizations Immunities Act, 22 United States Code 288 *et seq*.

The third of these declarations and reservations (No. 79), responds to a statement by Cuba reserving its right to take any steps that it may deem necessary against U.S. radio and television broadcasting to Cuba and denouncing U.S. use of radio frequencies at Guantanamo, Cuba. The U.S. response, which is similar to responses entered by the United States at previous ITU Conferences, reads as follows:

> The United States of America, noting Statement 72 entered by the delegation of Cuba, recalls its right to broadcast to Cuba on appropriate frequencies free of jamming or other wrongful interference and reserves its rights with respect to existing interference and any future interference by Cuba with U.S. broadcasting. Furthermore, the United States of America notes that its presence in Guantanamo is by virtue of an international agreement presently in force and that the United States of America reserves the right to meet its radiocommunication requirements there as it has in the past.

The fourth of these declarations and reservations, (No. 80), preserves the right of the United States to take such actions as it deems necessary in response to actions taken by other Member States that are detrimental to U.S. telecommunication interests. It reads as follows:

> The United States of America refers to declarations made by various Member States reserving their right to take such action as they may consider necessary to safeguard their interests with respect to application of provisions of the Constitution and the Convention of the International

> Telecommunication Union (Geneva, 1992), and any amendments thereto. The United States of America reserves the right to take whatever measures it deems necessary to safeguard U.S. interests in response to such actions.

The fifth of these declarations and reservations (No. 101), in which the United States joined 27 other countries, responds to a statement by Colombia concerning the use of the geostationary satellite orbit. It reads as follows:

> The delegations of the above-mentioned States, referring to the declaration made by the Republic of Colombia (No. 45), inasmuch as this and any similar statement refer[] to the Bogota Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, consider that the claims in question cannot be recognized by this conference.
>
> The above-mentioned delegations also wish to state that the reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not imply a recognition of claim to any preferential rights to the geostationary-satellite orbit.

F. OTHER ISSUES

1. Foreign Investment: Committee on Foreign Investment in the United States

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee, originally created by Executive Order 11858 (May 7, 1975), to oversee the national security implications of foreign investment in the U.S. economy. A proposal by Dubai Ports World ("DPW" or "DP World"), a state-owned company located in the United Arab Emirates, to acquire The Peninsular and Oriental Steam Navigation Company

("P&O"), a British firm that operates in a number of U.S. ports, generated public criticism based on national security concerns when it became known in early 2006. In March 2006 DP World first offered to submit to an additional 45-day national security review and subsequently announced that it would sell all of its operations at U.S. ports to an unrelated U.S. buyer in the next four to six months. In December 2006 DP World announced that it had entered into an agreement to sell its U.S. port operations to AIG Global Investment Group.

A February 24, 2006, press release by the Department of Treasury, which serves as the chair of CFIUS, described the process of evaluating the DP World project, as excerpted below. The full text of the press release is available at *www.ustreas.gov/press/releases/js4071.htm*. *See also* White House fact sheet released on February 22, 2006, available at *www.whitehouse.gov/news/releases/2006/02/20060222-11.html*.

---

* * * *

All members of the Committee on Foreign Investment in the United States (CFIUS) understand that their top priority is to protect our national security, including homeland security.

On November 29 of last year, two companies publicly announced a proposed transaction: Dubai Ports World (DPW), a state-owned company located in the United Arab Emirates, proposed to acquire The Peninsular and Oriental Steam Navigation Company (P&O), a British firm that operates in a number of U.S. ports and other ports around the world. The acquisition would include terminal port operations at a number of U.S. ports—not the ports themselves. The Department of Homeland Security (DHS), particularly the Coast Guard and U.S. Customs and Border Protection, is in charge of port security.

DPW and P&O believed that this proposed transaction could raise national security issues that should appropriately be reviewed by the U.S. Government. The companies contacted CFIUS on October 17 and voluntarily told the Committee of their intention to file a notification with CFIUS for a national security review. They also held

a complete briefing for DHS and other CFIUS members with security, defense, or law enforcement responsibilities on October 31.

Each of the CFIUS 12 members (departments and agencies) conducts its own internal analysis. In this case, the Departments of Transportation and Energy were also brought in to the CFIUS review to widen the scope and to add the expertise of those agencies reviewing the transaction.

On November 2, well before DP World and P&O filed with Treasury, CFIUS requested an intelligence assessment of the foreign acquirer. A little more than 30 days later—still well before the companies formally filed with CFIUS or the review began—the intelligence community provided CFIUS with a threat assessment regarding whether the foreign acquirer—DPW—has the intention or capability to threaten U.S. national security.

On December 6, the companies held another pre-filing briefing for all CFIUS agencies.

On December 16, the companies officially filed their formal notice with CFIUS, requesting a review. The 30-day formal review began on December 17. During that 30-day review period, DHS, which is the CFIUS agency with specific expertise on port security, negotiated an assurances letter with the companies. DHS also consulted with all other CFIUS members before the assurances letter was finalized on January 6.

On January 17, roughly 90 days after the parties to the transaction first approached CFIUS about the transaction and roughly 75 days after a thorough investigation of the transaction had begun, all CFIUS members agreed that this particular transaction should be allowed to proceed, pending any other regulatory hurdles before the companies.

* * * *

Excerpts below from testimony by Deputy Secretary of the Treasury Robert M. Kimmitt before the Senate Committee on Banking, Housing, and Urban Affairs on October 20, 2005, describe the legal framework and procedures of the CFIUS review process. The full text of the testimony is available at 2005 WL 2672313 (F.D.C.H.).

---

* * * *

Exon-Florio

Our open investment policy has always recognized the need to protect the national security, a need that is internationally recognized as a defensible exception to an open investment regime. The United States has numerous laws and regulations that provide this critical protection. CFIUS was established in 1975 by Executive Order of the President [40 Fed. Reg. 20,263 (May 7, 1975)] with the Secretary of the Treasury as its chair. Its main responsibility was "monitoring the impact of foreign investment in the United States and coordinating the implementation of United States policy on such investment." It analyzed foreign investment trends and developments in the United States and provided guidance to the President on significant transactions. However, it had no authority to take action with regard to specific foreign investments.

The Omnibus Trade and Competitiveness Act of 1988 [P.L. 100-418, title V, Subtitle A, Part II, 50 U.S.C. app 2170, as amended] added section 721 to the Defense Production Act of 1950 to provide authority to the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company that the President determines threatens to impair the national security of the United States. Section 721 is widely known as the Exon-Florio amendment, after its original congressional co-sponsors.

Specifically, the Exon-Florio amendment [50 U.S.C. App. § 2170] authorizes the President, or his designee, to investigate foreign acquisitions of U.S. companies to determine their effects on the national security. It also authorizes the President to take such action as he deems appropriate to prohibit or suspend such an acquisition if he finds that:

> (1) There is credible evidence that leads him to believe that the foreign investor might take action that threatens to impair the national security; and
> (2) Existing laws, other than the International Emergency Economic Powers Act (IEEPA) and the Exon-Florio amendment itself, do not in his judgment provide adequate and appropriate authority to protect the national security.

The President may direct the Attorney General to seek appropriate judicial relief to enforce Exon-Florio, including divestment. The President's findings are not subject to judicial review. Following the enactment of the Exon-Florio amendment, the President delegated to CFIUS the responsibility to receive notices from companies engaged in transactions that are subject to Exon-Florio, to conduct reviews to identify the effects of such transactions on the national security, and, if necessary, to undertake investigations. However, the President retained the authority to suspend or prohibit a transaction.

* * * *

The CFIUS process is governed by Treasury regulations that were first issued in 1991 (31 CFR part 800). . . .

CFIUS Implementation

Exon-Florio notices are voluntary. Many acquisitions by foreign investors do not implicate the national security, and parties to those transactions choose not to notify. However, companies know that failure to notify leaves their transaction subject to Presidential action indefinitely, and there is no statute of limitations. Companies also know that any CFIUS member may notify a transaction to the Committee.

During the initial 30-day review, each CFIUS member agency conducts its own internal analysis of the national security implications of the notified transaction. . . .

If within the initial 30-day period CFIUS determines that there are no national security concerns, or any national security concerns have been mitigated, thereby obviating an investigation, Treasury, on behalf of CFIUS, writes to the parties notifying them of that determination. This concludes consideration of the acquisition for Exon-Florio purposes. However, when the Committee believes that unresolved national security issues remain at the end of the 30-day period, CFIUS conducts an investigation that ends with a report and recommendation to the President.

Depending on the facts of a particular case, CFIUS agencies that have identified specific risks that a transaction could pose to the national security may, separately or through CFIUS auspices,

develop appropriate mitigation mechanisms to address those risks when existing laws and regulations alone are not adequate or appropriate to protect the national security.

Agreements implementing mitigation measures vary in scope and purpose, and are negotiated on a case by case basis to address the particular concerns raised by an individual transaction. Publicly available examples of the general types of agreements that have been negotiated include: Special Security Agreements, which provide security protection for classified or other sensitive contracts; Board Resolutions, which, for instance, require a U.S. company to certify that the foreign investor will not have access to particular information or influence over particular contracts; Proxy Agreements, which isolate the foreign acquirer from any control or influence over the U.S. company; and Network Security Agreements (NSAs), which are used in telecommunications cases and are imposed in the context of the Federal Communications Commission's (FCC) licensing process.

These examples in no way represent an exhaustive list of the kinds of agreements or mitigation measures that have been negotiated by CFIUS agencies. . . .

* * * *

When CFIUS completes a full 45-day investigation, it must provide a report to the President stating its recommendation. If CFIUS is unable to reach a unanimous recommendation after the investigation period, the Secretary of the Treasury, as Chairman, must submit a CFIUS report to the President setting forth the differing views and presenting the issues for decision. The President then has 15 days to announce his decision on the case and inform Congress of his determination.

* * * *

Since the enactment of Exon-Florio in 1988, CFIUS has reviewed over 1,570 foreign acquisitions of companies for potential national security concerns. In most of these reviews, CFIUS agencies have either identified no specific risks to national security or risks have been addressed during the review period. However, 25 cases in total have gone to investigation, twelve of which reached the

President's desk for decision. In eleven of those, the President took no action, leaving the parties to the proposed acquisitions free to proceed. In one case, the President ordered the foreign acquirer to divest all its interest in the U.S. company. In another case that did not go to the President, the foreign acquirer undertook a voluntary divestiture. Of the 25 investigations, six were undertaken since 2001 with one going to the President for decision. However, these statistics do not reflect the instances where CFIUS agencies implemented mitigation measures that obviated an investigation or where, in response to dialogue with CFIUS agencies, parties to a transaction either voluntarily restructured the transaction to address national security concerns or withdrew from the transaction altogether. An important aspect of the Exon-Florio process is the requirement that governmental action be concluded within specified time limits. Those limits—for instance, the initial 30-day review period—necessitate that the government act efficiently to assess all factors relating to the case. At the same time, the short time frame does not significantly hold up transactions, which should be driven by the market and can be time-sensitive.

* * * *

2. Intellectual Property

a. Patent law treaty

On September 5, 2006, President George W. Bush transmitted the Patent Law Treaty and Regulations Under the Patent Law Treaty ("Treaty"), done at Geneva on June 1, 2000, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 109-12. The President transmitted with the Treaty, for the information of the Senate, a report prepared by the Department of State and submitted with the Treaty by Secretary of State Rice to the President on September 5, 2006. The Treaty, adopted under the auspices of the World Intellectual Property Organization, has been signed by 53 countries including the United States plus the European Patent Office. As noted in excerpts from the State Department report that follow, the

effective date of draft U.S. legislation prepared to implement the Treaty is not contingent on entry into force of the Treaty because the changes were viewed as desirable in any event.

---

* * * *

Strong intellectual property protection is a cornerstone of free trade and global market access. This Treaty promotes patent protection by codifying, harmonizing, and reducing the costs of taking the steps necessary for obtaining and maintaining patents throughout the world. The provisions set forth in the Treaty will safeguard U.S. commercial interests by making it easier for U.S. patent applicants and owners to protect their intellectual property worldwide.

The Treaty generally sets forth the maximum procedural requirements that can be imposed on patent applicants, and in addition, provides standardized requirements for obtaining a filing date from which no party may deviate. Additionally, the Treaty provides that applicants cannot be required to hire representation for, among other things, the purpose of filing an application and that patents may not be revoked or invalidated because of noncompliance with certain application requirements, unless the noncompliance is a result of fraud. The Treaty does not limit the United States from providing patent requirements that are more favorable to the patent applicant or patent owner than those set forth in the Treaty or from prescribing requirements that are provided for in our substantive law relating to patents. Additionally, the Treaty is not intended to limit the United States from taking actions that it deems necessary for the preservation of its essential security interests.

This Treaty is in harmony with current U.S. patent laws and regulations, with minor exceptions to be addressed in proposed legislation. Because U.S. law does not require that each patent application apply to only one invention or inventive concept, and because the U.S. Patent and Trademark Office assesses that implementing a provision of the Treaty requiring "unity of invention" for all national applications would require a substantive and impractical change to our Patent Law, I recommend that the following

reservation be included in the U.S. instrument of ratification, as allowed by the Treaty:

> Pursuant to Article 23, the United States declares that Article 6(1) shall not apply to any requirement relating to unity of invention applicable under the Patent Cooperation Treaty to an international application.

* * * *

KEY PROVISIONS OF THE PATENT LAW TREATY

The Treaty sets forth, with one exception, the maximum procedural requirements that Contracting Parties may impose on patent applicants and patentees. The one exception is Article 5, which sets forth standardized requirements for obtaining a filing date from which Contracting Parties cannot deviate.

Article 2 presents two general principles: that a Contracting Party shall be free to provide requirements which, from the viewpoint of patent applicants and patent owners, are more favorable than the requirements set forth in the Treaty and the Regulations (annexed to the Treaty), and that nothing in the Treaty or its Regulations is intended to be construed as limiting the freedom of a Contracting Party to prescribe requirements provided for in its substantive law relating to patents. Article 3 describes the patent applications and patents to which the Treaty applies, which include utility patent applications that are filed with the Office of a Contracting Party (which for the United States would be the United States Patent and Trademark Office ("USPTO")). Article 5 provides a filing date standard. It mandates that a Contracting Party must, with only minor exceptions, provide a filing date for a patent application that is the date on which its Office has received the following elements:

> (i) an express or implicit indication to the effect that the submitted elements are intended to be an application;
> (ii) indications allowing the identity of the applicant to be established or allowing the applicant to be contacted; and
> (iii) a description of the invention to be patented.

Furthermore, Article 5 requires Contracting Parties to provide for "reference filing" in which a reference to a previously filed application shall, for the purposes of the filing date, constitute the description required for the subsequent application. During the negotiations of the Treaty, the United States strongly supported the adoption of this Article, with the knowledge that the requirement for the inclusion of a claim for filing date purposes pursuant to section 111(a) of title 35 of the United States Code would have to be eliminated if the United States were to become a party to the Treaty. Additionally, a new subsection will have to be added to section 111 of title 35 to implement the "reference-filing" provision.

Article 6 mandates that, except where otherwise provided in the Treaty, no Contracting Party shall require compliance with any requirement relating to the form or contents of an application which is different from, or additional to: (1) the requirements relating to form or contents which are provided for in respect of international applications under the Patent Cooperation Treaty ("PCT"), done in 1970 and to which the United States is a Party; (2) the requirements relating to form or contents compliance with which, under the PCT, may be required by Contracting Parties once the national stage processing or examination of an international application has started; and (3) any further requirements in the Regulations.

Of note, the incorporation of the "form or contents" requirements from the PCT into this Article mandates the application of the PCT's "unity of invention" requirement for all national applications. This is the requirement that an application relate to one invention only or to a group of inventions so linked as to form a single general inventive concept. United States law does not contain such a requirement.

The USPTO advises that U.S. law should not be amended to include a "unity of invention" requirement, as this is a substantive patent law matter that would be impractical for the USPTO to implement at this time. Article 23(1) permits the United States to take a reservation on this issue; our proposed reservation is addressed [in the letter of transmittal].

* * * *

. . . Article 12 and Rule 13 require that all Contracting Parties provide for the re-instatement of rights of an applicant or owner where such person has failed to comply with a time limit for an action before an Office and such failure has the direct consequence of causing a loss of rights with respect to an application or patent, subject to certain conditions. U.S. law already provides for revival of rights along the lines of those prescribed by this Article. The proposed implementing legislation for this Treaty includes a provision that would consolidate those existing provisions and apply a standard for relief that is consistent with current U.S. practice.

Article 13(1) requires Contracting Parties to provide for the correction or addition of a priority claim to an earlier application where a subsequent application is filed within the time limits prescribed in the Regulations. Paragraph (2) requires the restoration of priority rights where a subsequent application which claims or could have claimed the priority of an earlier application is filed after the expiration of the priority period but within the time limits prescribed by the Regulations and the failure to file within the priority period occurred in spite of due care having been taken or was unintentional. Paragraph (3) requires the restoration of the right of priority where there has been a failure to file a required copy of an earlier application. U.S. law currently permits correction and addition of priority claims, and during the negotiations the United States supported the concept of restoring priority rights for unintentional late filings. The acceptance of such delayed filings would require amendments to sections 119, 102(b) and 102(d) of title 35, United States Code.

Articles 15 through 27 are the Administrative and Final provisions of the Treaty. Notably, Article 15 obliges each Contracting Party to comply with the patent-related provisions of the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised and amended. The United States is a Party to that Convention and is already under an obligation to comply with those provisions. Article 22 applies the Treaty (other than Articles 5 and 6(1) and (2) and subject to the exclusion of proceedings in progress) to pending applications and patents which are in force,

on the date on which the Treaty binds that Contracting Party pursuant to Article 21.

Article 17 of the Treaty provides the Contracting Parties shall have an Assembly. The tasks of the Assembly, set forth in Article 17(2), include: dealing with matters concerning the maintenance and development of the Treaty and its application and operation; amending the Regulations; establishing Model International Forms; and performing other functions as are appropriate under the Treaty. Article 17(3) and (4) set forth voting procedures for the Assembly. Article 17(4) provides that the Assembly shall endeavor to take its decisions by consensus. Where, however, consensus cannot be achieved, decisions shall be taken by voting, in which each Contracting Party that is a State shall have one vote. Pursuant to Article 17(4)(ii), any Contracting Party that is an intergovernmental organization may vote, in place of its members, with a number of votes equal to the number of its Member States that are party to the Treaty. However, no such intergovernmental organization may participate in the vote if any one of its Member States exercises its right to vote (either as a party to the Treaty or as a member of another such intergovernmental organization), and vice versa.

* * * *

IMPLEMENTING LEGISLATION

The legislation proposed to implement the Treaty states that it will take effect on the date that is one year after the date of enactment of the legislation. The proposed legislation also provides that it will apply to all patents, whenever granted, and to all applications for patents pending on, or filed after, the date that is one year after the date of enactment of the legislation. Because the changes required for compliance with the Treaty are viewed by industry as desirable in and of themselves, the effective date of the proposed legislation is not contingent on entry into force of the Treaty. The delay of one year for the entry into effect of the legislation is necessary to provide sufficient time for the USPTO to promulgate the necessary implementing regulations.

* * * *

b. Agreement on international registration of industrial designs

On November 13, 2006, President Bush transmitted The Geneva Act of The Hague Agreement Concerning the International Registration of Industrial Designs, adopted in Geneva on July 2, 1999, and signed by the United States on July 6, 1999. S. Treaty Doc. 109-21. The transmittal included a report of the Department of State for the information of the Senate. Excerpts follow from the President's transmittal letter, the letter of the Secretary of State submitting the treaty to the President, and sections of the attached Department of State report addressing implementing legislation and declarations.

LETTER OF TRANSMITTAL

* * * *

This Agreement promotes the ability of U.S. design owners to protect their industrial designs by allowing them to obtain multinational design protection through a single deposit procedure. Under the Agreement, U.S. design owners would be able to file for design registration in any number of the Contracting Parties with a single standardized application in English at either the U.S. Patent and Trademark Office or at the International Bureau of the World Intellectual Property Organization (WIPO). Similarly, renewal of a design registration in each Contracting Party may be made by filing a single request along with payment of the appropriate fees at the International Bureau of WIPO. This Agreement should make access to international protection of industrial designs more readily available to U.S. businesses.

In the event that the Senate provides its consent to ratify the Agreement, the United States would not deposit its instrument of ratification until the necessary implementing legal structure has been established domestically.

I recommend that the Senate give early and favorable consideration to this Agreement and give its advice and consent to its

ratification, subject to the declarations described in the accompanying report of the Department of State.

LETTER OF SUBMITTAL

* * * *

The Agreement traces its roots to the Hague Agreement Concerning the International Deposit of Industrial Designs done at The Hague, Netherlands, on November 6, 1925, which entered into force in 1928, and was revised numerous times. For the 42 current member states of the Hague Union, these existing agreements facilitate the obtainment of intellectual property protection for industrial designs by allowing multinational patent protection in a number of countries through a single "international deposit" procedure. However, these Acts did not meet the needs of nations, such as the United States, that review each application individually. This Agreement allows the United States to partake in the benefits of facilitating multinational design protection for applicants while continuing its system of individual review.

* * * *

Implementing Legislation

In the event that the Senate provides its advice and consent to ratify this Agreement, the United States would not deposit its instrument of ratification until the necessary implementing legal structure had been established domestically, so as to ensure that the United States was capable of complying with the provisions of this Agreement. Such implementation requirements include the enactment of legislation, and the promulgation of new regulations by the USPTO.

Declarations to Accompany United States Ratification

The Agreement contemplates that Contracting Parties may make declarations with respect to certain articles. The Department of State recommends that the United States ratification to the Agreement be accompanied by nine declarations, pursuant to Agreement Articles 5(2)(a), 7(2), 11(1)(b), 13(1), 16(2), and 17(3)(c), and Agreement Rules 8(1), 13(4) and 18(1)(b).

The first listed declaration . . . :

Pursuant to Article 5(2)(a) and Rule 11(3) of the Agreement, the United States declares that it is an Examining Office under the Agreement whose law requires that an application for the grant of protection to an industrial design contain: (i) indications concerning the identity of the creator of the industrial design that is the subject of the application; (ii) a brief description of the reproduction or of the characteristic features of the industrial design that is the subject of the application; and (iii) a claim. The specific wording of the claim shall be in formal terms to the ornamental design for the article (specifying name of article) as shown, or as shown and described.

The second declaration . . . :

Pursuant to Article 7(2) and Rule 12(3) of the Agreement, the United States declares that, as an Examining Office under the Agreement, the prescribed designation fee referred to in Article 7(1) of the Agreement shall be replaced by an individual designation fee, that is payable in a first part at filing and a second part payable upon allowance of the application. The current amount of the designation fee is US$790, payable in a first part of US$330 at filing and a second part of US$460 upon allowance of the application. However, for those entities that qualify for "small entity" status within the meaning of section 41(h) of title 35 of the United States Code and section 3 of the Small Business Act, the amount of the individual designation fee is US$395, payable in a first part of US$165 and a second part of US$230. In addition, these amounts are subject to future changes upon which notification to the Director General will be made in future declarations as authorized in Article 7(2) of the Agreement.

The third declaration . . . :

Pursuant to Article 11(1)(b) of the Agreement, the United States declares that the law of the United States

does not provide for the deferment of the publication of an industrial design.

The fourth declaration . . . :

Pursuant to Article 13(1) of the Agreement, the United States declares that its laws require that only one independent and distinct design may be claimed in a single application.

The fifth declaration, authorized by Article 16(2) of the Agreement, allows the USPTO to refuse the effect of recordings regarding change of ownership in the international registration until the USPTO receives assignment statements or documents. This would allow the USPTO to maintain its current practice of requiring that a statement to the effect that a conveyance has been made be submitted to the USPTO and be made available to the public. Under U.S. patent law, if such an assignment is not recorded within three months, the transfer is void against subsequent bona fide purchasers or mortgagees. This protects subsequent purchasers by allowing them to view the contents of any agreement that purports to transfer ownership.

* * * *

Pursuant to Article 16(2) of the Agreement, the United States declares that a recording by the International Bureau under Article 16(1)(i) of the Agreement shall not have effect in the United States until the USPTO has received the statements or documents recorded thereby.

The sixth declaration . . .:

Pursuant to Article 17(3)(c) of the Agreement, the United States declares that the maximum duration of protection for designs provided for by its law is 15 years from grant.

The seventh declaration . . .:

Pursuant to Rule 8(1) of the Agreement, the United States declares that the law of the United States requires

that an application for protection of an industrial design be filed in the name of the creator of the industrial design. The specific form and mandatory contents of a statement required for the purposes of Rule 8(2) of the Agreement are contained in section 1.63 of title 37 of the Code of Federal Regulations of the United States.

The eighth declaration, authorized by Rule 13(4) of the Agreement, allows the USPTO to notify the Director General that the law of the United States requires a security clearance and that the period of one month identified in Rule 13(3) for the Office of a Contracting Party to forward an application to the IB, shall be replaced by a period of six months. This will allow for time to complete the security review of the applications currently required by 35 U.S.C. 181, et seq. . . .

* * * *

Pursuant to Rule 13(4) of the Agreement, the United States declares that the period of one month referred to in Rule 13(3) of the Agreement shall be replaced by a period of six months as to the United States in light of the security clearance required by United States law.

The ninth declaration . . . :

Pursuant to Rule 18(1)(b), the United States declares that the period of six months referred to in Rule18(1)(a) of the Agreement shall be replaced by a period of twelve months with respect to the United States, as the Office of the United States is an Examining Office under the Agreement.

3. U.S.-Uruguay Bilateral Investment Treaty

On April 4, 2006, President George W. Bush transmitted the Treaty Between the United States and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal

Protection of Investment, with Annexes and Protocol, Signed at Mar Del Plata, Argentina, on November 4, 2005, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 109-9. Excerpts follow from the President's transmittal letter.

---

* * * *

The Treaty is the first bilateral investment treaty (BIT) concluded since 1999 and the first negotiated on the basis of a new U.S. model BIT text, which was completed in 2004. The new model text draws on long-standing U.S. BIT principles, our experience with Chapter 11 of the North American Free Trade Agreement (NAFTA), and the executive branch's collaboration with the Congress in developing negotiating objectives on foreign investment for U.S. free trade agreements. The Treaty will establish investment protections that will create more favorable conditions for U.S. investment in Uruguay and assist Uruguay in its efforts to further develop its economy.

The Treaty is fully consistent with U.S. policy towards international and domestic investment. A specific tenet of U.S. investment policy, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive national treatment and most-favored-nation treatment. Under this Treaty, the Parties also agree to customary international law standards for expropriation and for the minimum standard of treatment. The Treaty includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation for expropriation; free transfer of funds related to investment; freedom of investment from specified performance requirements; and the opportunity of investors to [choose] to resolve disputes with a host government through international arbitration. The Treaty also includes extensive transparency obligations with respect to national laws and regulations, and commitments to transparency and public participation in dispute settlement. The Parties also recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental and labor laws.

In her letter submitting the treaty to the President, Secretary of State Condoleezza Rice noted that "[i]t is the Administration's policy to maintain broad consistency between BITs and the investment chapters of [free trade agreements.]"

The customary international law standards referred to in the President's letter are set forth in Articles 5 and 6 and Annexes A and B of the treaty, excerpted below.

---

* * * *

Article 5: Minimum Standard of Treatment[9]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

---

[9] Article 5 shall be interpreted in accordance with Annex A.

4. Notwithstanding Article 14(5)(b), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6(2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 but for Article 14(5)(b).

Article 6: Expropriation and Compensation[10]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law and Article 5(1) through (3).

[10] Article 6 shall be interpreted in accordance with Annexes A and B.

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;
(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c)—converted into the currency of payment at the market rate of exchange prevailing on the date of payment—shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

* * * *

Annex A
Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice

of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6(1) addresses two situations. The first is known as direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public

health, safety, and the environment, do not constitute indirect expropriations.

* * * *

The U.S. Senate provided advice and consent to ratification of the U.S.-Uruguay Bilateral Investment Treaty on September 14, 2006. 152 CONG. REC. S9446. *See also* S. Exec. Rpt. 109-17, annexing a transcript of the July 12, 2006, Senate Foreign Relations Committee that also includes written testimony of Assistant Secretary of State for Economic and Business Affairs Daniel S. Sullivan in support of advice and consent to ratification and responses to questions for the record. The treaty entered into force November 1, 2006.

4. Cuban Trademark Litigation

In 2005 the U.S. Court of Appeals for the Second Circuit held that the Cuban embargo barred a Cuban tobacco company from acquiring the cigar trademark COHIBA in the United States and reversed a district court decision granting relief to the Cuban company. *Empresa Cubana del Tabaco v. General Cigar Co., Inc.*, 399 F.3d 462 (2d Cir. 2005). The history of the case and the U.S. submission to the Second Circuit are discussed in *Digest 2005* at 663-71; *see also Digest 2004* at 663-70. Empresa Cubana del Tabaco, doing business as Cubatabaco ("Cubatabaco"), filed a petition for a writ of certiorari with the U.S. Supreme Court. At the invitation of the Court, in May 2006 the United States filed a brief as *amicus curiae* arguing that certiorari should not be granted.

In its brief, the United States stated that the court of appeals "correctly concluded that Cubatabaco does not own the United States rights to COHIBA because the [U.S. Cuban Assets Control Regulations ("CACRs")] prohibit transfers of trademarks by operation of law." Further, the United States argued that other issues discussed by the court of appeals did not present any question warranting the Court's review.

The Supreme Court denied the petition. 126 S. Ct. 2887 (2006).

The full text of the U.S. brief, excerpted below, is available at *www.usdoj.gov/osg/briefs/2005/2pet/6invit/2005-0417.pet.ami.inv.html*. (Citations to other submissions are omitted). Litigation challenging the authority of the Office of Foreign Assets Control to impose Cuba sanctions to deny a license for renewal of a trademark is discussed in Chapter 16.B.3.a.

---

* * * *

1. Cubatabaco first seeks resolution of a matter that it did not initially raise in the court of appeals, but the United States, as amicus curiae, noted in its letter brief. The United States observed that, while the CACRs prohibit Cubatabaco from obtaining the United States rights to the COHIBA trademark, the CACRs do not necessarily preclude a court from awarding certain other relief under Section 43(a) of the Lanham Act, because "it does not appear that the acquisition of a U.S. trademark by Cubatabaco is a necessary predicate for [those] remedies." The United States explained that, while Section 43(a) is usually invoked by the holder of a United States trademark, there may be a "limited category of section 43(a) actions in which the plaintiff need not prove that it holds the valid United States trademark in order to obtain the remedies of cancellation of the defendant's registration and injunction against the defendant's use of the mark." The court of appeals rejected that possibility in this case, concluding that it would effectively result in the "same transfer" of property rights that the CACRs forbid. The court of appeals' rejection of that theory, while in error, does not present a matter warranting this Court's review.

a. The United States' letter brief, which precipitated the court of appeals' discussion, addressed only the abstract question of whether the CACRs would bar all Section 43(a) relief and not the separate question of whether Cubatabaco had properly preserved a possible Section 43(a) claim not based on ownership of the United States trademark. The court of appeals expressly recognized,

however, that "Cubatabaco did not litigate this Section 43(a) claim in the District Court." The court explained that it nevertheless would address the possibility of such a claim because, if respondents had not been tardy in raising their CACR-based objections, "Cubatabaco might have litigated in the District Court a claim of the type imagined by the United States." The court of appeals' discussion of a possible claim that Cubatabaco did not assert in the district court, the district court neither reached nor resolved, and the court of appeals reached only because it addressed another unpreserved issue that is not included in the petition, does not arise in a concrete context that would be appropriate for review by this Court.

b. Moreover, the court of appeals' discussion of the hypothetical Section 43(a) claim was closely bound up with the highly unusual factual scenario before it and the application of the CACRs. The court of appeals rejected the United States' suggestion that a Section 43(a) claim based on consumer confusion over origin, but not based on ownership of the United States mark, might lie in the circumstances of this case. The court relied, however, on its antecedent holding, which Cubatabaco does not challenge, that the CACRs barred Cubatabaco from obtaining ownership of the United States trademark under the famous marks doctrine and that respondents therefore had a priority over Cubatabaco with respect to that mark by virtue of their otherwise valid registration of the mark in the United States. The court's decision accordingly is limited to the situation in which a foreign trademark owner: (i) owns a foreign mark that might meet the demanding requirements of the famous marks doctrine; (ii) has elected not to register that well known foreign mark in the United States despite the obvious advantages of doing so; and (iii) is subject to a federal law that bars the acquisition of the United States mark by operation of the famous marks doctrine. Although the United States views the court of appeals' decision as in error, it knows of no other judicial or administrative action presenting those highly unusual circumstances, nor does it expect that such cases might arise in the future.

* * * *

ii. An owner of a well known foreign trademark that registers or uses its mark in the United States obtains very substantial protection under United States law because the Lanham Act provides owners with an established and effective means of protecting rights obtained through registration or use. Although Cubatabaco has long faced the CACRs' restrictions on use of the mark on products sold in the United States, the CACRs do allow Cuban entities to register trademarks, a course that Cubatabaco considered but did not pursue to protect its COHIBA trademark. See . . . 15 U.S.C. 1126(e) (2000 & Supp. II 2002) (allowing United States registration based on foreign registration); 31 C.F.R. 515.527 (general license allowing Cuban entities to register trademarks). If Cubatabaco had followed the familiar registration regime that other owners typically follow, it would have had no need to turn to an unpreserved Section 43(a) claim. See . . . 15 U.S.C. 1115(a) (registration establishes a presumption of "ownership" and the "exclusive right to use the mark"); *see generally Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985).

iii. Likewise, the court of appeals' decision does not implicate the right of owners not subject to the CACRs or some other extraordinary federal bar. Even the hypothetical foreign trademark owner that has registered and uses its famous mark abroad, but has not registered or used it in the United States, would have no need to resort to a non-infringement-based Section 43(a) remedy for consumer confusion unless the owner also faces an extraordinary federal bar on the expected operation of the famous marks doctrine. The court of appeals did not hold that, in the absence of such a bar, it would limit the Section 43(a) remedies of the owner or otherwise fail to give the foreign owner priority in this country. Its ruling on non-infringement-based Section 43(a) remedies was premised on, and designed to protect, the limits imposed by the CACRs. The federal bar at issue here, arising from the CACRs, pertains exclusively to property in which Cuba or a Cuban national has an interest, and it is therefore quite limited. Few similar laws exist, and other comprehensive sanctions regimes contain different language regarding trademarks that may not bar the operation of the famous marks doctrine. See, e.g., 31 C.F.R. 538.514(a)(2) (Sudanese Sanctions Regulations authorizing "[t]he receipt of a

patent, trademark, copyright or other form of intellectual property protection"); accord 31 C.F.R. 560.509 (Iranian Transaction Regulations).

* * * *

2. Cubatabaco urges this Court to resolve whether, if there is a conflict between the CACRs and the United States' treaty obligations under Article 6*bis* of the Paris Convention, the regulations or the treaty provisions would control. The court of appeals suggested that, if there were an irreconcilable conflict, the CACRs would prevail. Cubatabaco argues that the court of appeals has effectively ruled that the CACRs abrogated Article 6*bis* and that the court's ruling is "such an unusual judicial intrusion into the Executive's foreign affairs powers, and so threatens to embarrass the Executive in its conduct of foreign relations, that it requires review by this Court." Cubatabaco, however, does not accurately characterize the government's position or the court of appeals' discussion of the issue.

The United States stated in its amicus curiae letter brief that the CACRs and Article 6*bis* of the Paris Convention are compatible and that a Section 43(a) claim for consumer confusion, without a claim of ownership of the United States trademark, would provide an avenue for obtaining the relief that Article 6*bis* envisions. Cubatabaco, however, did not preserve such a claim in this case. The court of appeals expressed its view that such a claim, in any event, would not be available, and it further stated its view that Article 6*bis* and Sections 44(b) and (h) of the Lanham Act would not "require cancellation of [respondents'] properly registered trademark or an injunction against its use of the mark in the United States under these circumstances". The court of appeals then stated that, if there were "an irreconcilable conflict" between the CACRs and Article 6*bis*, the CACRs would prevail. Ibid. The government did not address the question of what result would obtain if the CACRs and Article 6*bis* were in conflict. The court of appeals' observation that the CACRs would prevail in such a situation is plainly dicta that is not likely to "embarrass the Executive in its conduct of foreign relations" especially in light of the Executive's ability to modify the CACRs to ameliorate any perceived conflict.

In any event, the resolution of a hypothetical conflict between the CACRs and Article *6bis* of the Paris Convention does not warrant this Court's review. As noted above, the specific legal question here—whether the holder of a famous mark from an embargoed country can obtain the cancellation, and injunction against the use, of a competing domestic mark—is so narrow that this is the only known case involving such a question. Nor is there any broader question here worthy of this Court's review. This Court has clearly articulated the relevant legal standard: "[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Breard v. Greene*, 523 U.S. 371, 376 (1998) (*quoting Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)). The court of appeals properly acknowledged that standard.

* * * *

5. U.S.-Indonesia Illegal Logging Initiative

On November 16, 2006, U.S. Trade Representative Susan Schwab signed a bilateral agreement with Indonesian Trade Minister Mari E. Pangestu and Forestry Minister M.S. Kaban to enhance joint efforts between the two countries to combat illegal logging and associated trade. A USTR press release of that date explained:

> The agreement is the first of its kind for both countries. This agreement is designed to promote forest conservation by combating illegal logging and associated trade, and to help ensure that Indonesia's legally-produced timber and wood products continue to have access to markets in the United States and elsewhere.

The press release, excerpted further below, is available at *www.ustr.gov/Document_Library/Press_Releases/2006/November/Section_Index.html*. The text of the agreement is available at *www.ustr.gov/assets/World_Regions/Southeast_Asia_Pacific/asset_upload_file357_9974.pdf*.

---

* * * *

The MOU envisions ongoing action between U.S. and Indonesian authorities to share information on timber trade, including information on illegally-produced timber products, and cooperation in law enforcement activities. The $1 million the United States has committed immediately is to fund initial supporting projects, such as remote sensing of illegal logging activities and enhancing partnerships with NGOs and the private sector.

* * * *

This new agreement is an element of President Bush's global Initiative to Address Illegal Logging that was launched in 2003. In order to guide implementation and identify priority actions that both countries will undertake, the agreement establishes a working group under the existing U.S.-Indonesia Trade and Investment Framework Agreement (TIFA).

The agreement is one of several important initiatives the United States is carrying out under this bilateral trade and investment dialogue to help support Indonesia's efforts to strengthen that country's investment climate. It is part of a broader effort to deepen the United States' economic relations with this important country, and with Southeast Asia as a whole.

* * * *

Background

This United States-Indonesia agreement on joint action on illegal logging will build on existing Indonesian efforts to combat illegal logging and to restructure its forest sector. It will help ensure that Indonesia's legally produced timber and wood products have continued access to U.S. and other international markets. The United States is focusing this effort on Indonesia because of the importance of bilateral trade in forest products and because Indonesian forests and their biodiversity present a significant conservation opportunity. In addition, Indonesia has demonstrated a strong political commitment to addressing the problem and has asked for the United States to partner with it on this important effort.

In addition to the illegal logging agreement, the TIFA dialogue has also resulted in other notable recent achievements, including an agreement signed in September on cooperation to stop illegal

transshipments of textiles and apparel through Indonesia to the United States. The TIFA dialogue has also fostered enhanced cooperation on the enforcement of intellectual property rights, which led to a U.S. Government decision announced earlier this month to improve Indonesia's standing on the Special 301 Watch List.

* * * *

See also USTR press release of April 4, 2006, concerning meetings of U.S. and Indonesian delegations under the U.S.-Indonesia Trade and Investment Framework Agreement to discuss a wide range of bilateral issues, including, in addition to illegal logging, agriculture, investment, intellectual property, and customs, and transshipment of goods, available at *www.ustr.gov/Document_Library/Press_Releases/2006/April/Section_Index.html*.

Cross References

U.S. embargo on Cuba, **Chapter 6.A.3.**
Commercial private international law, **Chapter 15.A.**
International civil litigation in U.S. courts, **Chapter 15.C.**
Economic sanctions, **Chapter 16.**
Trademark issues in challenge to imposition of sanctions, **Chapter 16.B.3.a.**
Conflict diamonds, **Chapter 17.A.7.**

11-Cummins-Chap11.indd 804 10/22/07 11:44:45 PM

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. Freedom of Navigation

a. Oceans and the law of the sea

On December 7, 2006, Dr. C. Edward Floyd, U.S. Senior Advisor, addressed the UN General Assembly on Agenda Item 71(a): Oceans and the Law of the Sea, and Agenda Item 71(b): Sustainable fisheries. The latter is discussed in Chapter 13.A.2.d.(3). Dr. Floyd's statement on oceans and law of the sea, adopted as UN General Assembly Resolution 61/222, is excerpted below. The full text of the statement is available at *www.un.int/usa/06_388.htm*.

---

* * * *

In a salutary break with tradition, negotiators this year agreed on the focus topics for the next *two* meetings of the UN Informal Open-ended Consultative Process on Oceans and the Law of the Sea. Next June we will focus on marine genetic resources, in areas both inside and outside of national jurisdiction. We are grateful to our Brazilian colleagues for proposing this topic, and for their flexibility in broadening the topic to include resources under the jurisdiction of coastal States.

We are also grateful to our Australian colleagues for proposing the topic chosen for the 2008 ICP meeting: maritime security

12-Cummins-Chap12.indd 805 10/22/07 11:45:15 PM

and safety. This timely and important topic will remind the international community that compliance with and implementation of provisions of the Law of the Sea Convention are critical to the security of all nations and to the safety and efficiency of international commerce.

* * * *

We also appreciate the leadership of Chinese colleagues in developing the section of the resolution on the Commission on the Limits of the Continental Shelf. We all recognize the importance of the Commission's work and its need for additional support.

The United States places great importance on compliance with operative paragraph 65, which "calls upon States to ensure freedom of navigation and the rights of transit passage and innocent passage in accordance with international law, in particular the Convention."

We note that the International Maritime Organization has not authorized compulsory pilotage or any enforcement measures for failure to take a pilot through any strait used for international navigation.

That said, the United States strongly encourages all ships to take a pilot when transiting straits used for international navigation that are particularly difficult to navigate, in circumstances that do not entail denying, hampering or impairing the right of transit passage as specified in the Convention. Acceptance of a pilot in these circumstances will also assist in protecting sensitive ecosystems, a goal that all countries share with states bordering straits used for international navigation.

* * * *

b. Straits

(1) Malacca and Singapore

Malaysia hosted the second International Maritime Organization ("IMO")-sponsored meeting on "The Straits of Malacca and Singapore: Enhancing Safety, Security and

Environmental Protection," held in Kuala Lumpur from September 18-20, 2006. A statement adopted by the conference on September 20, explained the purpose of the Kuala Lumpur Meeting as being

> to provide an opportunity for further discussions on the recent developments relating to safety, security and environmental protection of the Straits of Malacca and Singapore (hereinafter referred to as "the Straits") with the aim of developing mechanisms and programmes to facilitate co-operation in keeping the Straits safe and open to navigation, including the possible options for burden sharing.

The statement is attached as an annex to U.N. Doc. A/61/584, available at *http//:documents.un.org* and at *www.imo.org/includes/blastDataOnly.asp/data_id%3D15677/kualalumpur-statement.pdf*. The statement also recorded agreements reached at the meeting that projects presented by Malaysia, Singapore, and Indonesia for enhancing safety of navigation and environmental protection should be supported, and that "the littoral States should continue their efforts towards enhancing maritime security in the Straits."

In his statement at the closing ceremony on September 20, 2006, U.S. Ambassador to Malaysia Christopher J. LaFleur, head of the U.S. delegation, summarized the U.S. legal views, stating:

> The U.S. recognizes and respects the territorial integrity and sovereignty of the littoral States and accepts that, under the law of the sea and other international treaties, they have the responsibility for securing these vital sea lanes.

U.S. Coast Guard Vice Admiral Charles Wurster, alternate head of the U.S. delegation, made formal presentations to session 3 concerning the perspective of the United States as a user state and the future of cooperative efforts to enhance maritime security; session 8 on exploring modalities for

future cooperation; and session 9 on the prioritization of needs for projects on safety of navigation and environmental protection. Brief excerpts from Vice Admiral Wurster's presentations in sessions 3 and 8 are provided below. The full texts of his statements and of Ambassador LaFleur's closing remarks are available at *www.state.gov/s/l/c8183.htm*.

Session 3 (September 18, 2006)

* * * *

Collectively, we seek an effective framework at the political and operational levels that facilitates bilateral and multilateral progress toward achieving our shared goal of enhancing the safety, security and environmental protection of the Straits. As I said last year, this framework should facilitate enhanced awareness of the maritime areas, increased operational presence of littoral States to enhance deterrence, and improvement in their ability to effect timely response. It should also promote donor coordination and prevent redundancy.

The maritime industry and the marine transportation system are global ventures. We can best enhance the safety, security and environmental protection of the maritime sector through international collaborative partnerships. This is especially true for the Malacca and Singapore Straits, through which one third of the world's shipping and half of its oil passes.

As we know, a disruption of shipping traffic through the Straits—whether through a navigation accident, catastrophic environmental mishap, or terrorist event—would have an immediate and substantial negative effect on the entire global economy. User states rely upon safe navigation and the unimpeded flow of shipping through the Straits. We must act together to maintain them.

Those committing unlawful acts against ships and seafarers in the Straits, however, have no respect for national sovereignty, freedom of navigation, or international law. These maritime criminals can exploit national maritime boundaries and remote areas within the territorial seas and archipelagic waters of nearby nations. The enforcement authorities of littoral States face a difficult challenge

in thwarting this tactic of transnational criminals. It is our collective responsibility to assist littoral States in their efforts to enhance their capabilities, while fully respecting the sovereignty and sovereign rights of each of the littoral States. By this and other conferences and by bilateral and multilateral actions, we are demonstrating our shared responsibility to continuously strengthen cooperation among the littoral and user states and protect the safety, security and environment of the Straits.

In this regard, we welcome the continued commitment of the International Maritime Organization to promote collaborative efforts towards enhancing safety, security, and environmental protection in the Straits. . . . IMO involvement with its Member States ensures that arrangements are consistent with international law. . . .

* * * *

. . . Secretary General Mitropoulos clearly articulated what the roles of the littoral and user States should be in protecting the Straits. The littoral States must play a central role in all collaborative efforts to ensure that their sovereignty is respected.

* * * *

. . . We are facing complex issues:

- such as the use of inter-operative technology,
- the sharing of information,
- the development of additional common operating procedures,
- and the negotiation of bilateral and multilateral arrangements in order to achieve seamless connectivity.

* * * *

It is important to remember, however, that whatever new steps are considered—whether they be tolls, pilotage, or something else—these measures may not have the effect of denying, hampering or impairing the right of transit passage through the Straits. Any measure implemented must maintain the balance between the unimpeded flow of commerce and the safety and security of the waterways.

* * * *

Session 8 (September 19, 2006)

* * * *

The United States has listened with great interest to the proposal by the littoral States for the establishment of a co-operative mechanism between them and user States on the safety of navigation and environmental protection in the Straits of Malacca and Singapore.

The United States is particularly pleased that the proposal acknowledges the need for a mechanism to promote dialogue and facilitate close collaboration between the littoral States, user States and other interested parties, while at the same time fully respecting the sovereignty and territorial integrity of the littoral States.

* * * *

(2) Torres Strait: Pilotage

In May 2006 the Australian Maritime Safety Agency ("AMSA") published a Marine Notice indicating that a compulsory pilotage scheme for the Torres Strait would commence on October 6, 2006. The United States and several other countries viewed this action as directly contrary to the decision of the IMO in July 2005 unless implemented as a condition of entry into Australian ports. *See Digest 2005* at 686-87. On June 7, 2006, the U.S. Embassy in Canberra delivered a diplomatic note protesting the announced compulsory pilotage scheme. The operative paragraphs of the diplomatic note are set forth below in full.

[The United States] refers to Schedule 2, "Amendment of the Navigation Act 1912," to the Maritime Legislation Amendment Act 2006 (No. 24, 2006), to Maritime Notice 8/2006, "Revised Pilotage Requirements for Torres Strait," issued by the Australian Maritime Safety Authority on 16 May 2006, and to the pending amendments to Marine Orders Part 54, "Coastal Pilotage," to institute a system of compulsory pilotage in the Torres Strait, with criminal penalties for non-compliance, effective 6 October 2006.

The Embassy notes that the Marine Notice refers to IMO Resolution MEPC.133(53), adopted on 22 July 2005, as a basis for imposing these new requirements. The Embassy wishes to draw the attention of the Government of Australia to the fact that the United States' support for this resolution was conditioned on Australia's acceptance of the fact that it "provided no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation. . . . The United States stressed that it would urge ships flying its flag to act in accordance with the *recommendatory* Australian system of pilotage for ships in transit through the Torres Strait to the extent that doing so did not deny, impair, hamper, or impede transit passage." (Emphasis added.) This view is recorded in paragraph 8.5 of the report of MEPC 53. Paragraph 8.6 of the report notes that several delegations supported the statement of the United States and that the delegation of Australia indicated it did not object to the statement.

As is well known to the Government of Australia, it is the firm position of the United States that there is no basis in the international law of the sea as reflected in the Law of the Sea Convention for the institution of a system of compulsory pilotage in a strait used for international navigation, such as the Torres Strait, applicable to ships exercising the right of transit passage.

At the same time, the United States continues to recognize the environmental sensitivity of the Torres Strait and to support raising international awareness of this sensitivity and the facilitation of safe and efficient shipping within this Strait. The United States supported the new two-way route in the Great North-East channel of the Torres Strait. The United States believes that MEPC resolution MEPC.133(53) is clear in its language and effect and represents a serious commitment by IMO and Member States regarding protection of the Torres Strait.

Accordingly, the United States urges the Government of Australia to conform its laws and regulations with the law of the sea and the understandings reached at the IMO. While, as noted above, the United States will urge ships flying its flag to act in accordance with a recommendatory Australian system of pilotage for ships in transit through the Torres Strait to the extent that doing so does

not deny, impair, hamper, or impede transit passage, the United States cannot accept application of this scheme of compulsory pilotage to ships flying its flag exercising their right of transit passage through the Torres Strait, and reserves its rights and those of its nationals, owners, masters and other persons on board ships flying its flag.

On August 11, 2006, the Australian Department of Foreign Affairs and Trade responded to the U.S. note disputing the U.S. views, stating that "[t]he words of the resolution and the compulsory nature of Australia's system of pilotage for the Torres Strait were well understood by the participants at the IMO" and that the fact that "no objection was taken [by Australia] to the U.S. statement [relating to the legal basis for mandatory pilotage] does not imply that the position put forward by the United States is accepted by Australia as correct."

c. Swedish territorial waters

On July 13, 2006, the Swedish Ministry of Foreign Affairs delivered an *aide-memoire* to the U.S. Embassy in Stockholm asserting that activities of certain U.S. vessels on July 5 and 8 violated Swedish law regulating passage through Swedish territorial waters. On August 8, 2006, following a U.S. Department of Defense examination of the incidents, the U.S. Embassy in Stockholm delivered the U.S. response, explaining that the U.S. vessels in question were exercising the right of innocent passage. The operative paragraphs of the U.S. responsive *aide-memoire* are set forth below.

[The United States] refers to the Ministry's Aide Memoire dated July 13, 2006, asserting that the actions of USS THE SULLIVANS on July 5, 2006, and of USS MONTEREY on July 8, 2006 described in the *Aide Memoire* "constitute a violation of Swedish Admission Ordinance (SFS 1992:118), Section 3, regulating passage through Swedish territorial waters."

The Embassy understands that section 3 of the Swedish Admission Ordinance (SFS 1992:118), as amended in 1994, provides:

> Admission is granted to foreign state vessels for passage through the Swedish territorial sea. Passage through the Swedish territorial sea by foreign state vessels shall take place in a manner not prejudicial to the peace, good order or security of the country.

The Embassy notes that the Ministry's *aide memoire* contains no suggestion that either ship engaged in activities described in paragraph 2 of article 19 of the Law of the Sea Convention defining those activities considered to be prejudicial to the peace, good order or security of the coastal State.

The Embassy understands from the *aide memoire* that the Swedish Armed Forces Headquarters believes the passage of these two U.S. warships through the Swedish territorial sea was not "innocent passage" under international law as reflected in the definition in the 1982 Law of the Sea Convention because the passage was not "continuous and expeditious."

The U.S. Department of Defense has examined these "incidents" and advises:

> —On July 5, 2006, USS THE SULLIVANS (DDG 68) was transiting through the Kattegat strait enroute from Aarhus, Denmark to Cobh, Ireland. The transit took USS THE SULLIVANS through the Swedish territorial sea, approximately 10 nautical miles off the coast of Sweden. All course corrections referenced in the Swedish Aide Memoire of 13 July 2006 were conducted in order to maintain track and safe navigation. While in the Swedish territorial sea USS THE SULLIVANS was exercising the right of innocent passage.
>
> —On July 8, 2006, USS MONTEREY (CG 61) was transiting south of the Oslofjorden bay, heading towards the Kattegat strait. The transit took USS MONTEREY through the Swedish territorial sea, approximately 11.9 nautical miles off the coast of the Vaderoarna Islands. While in the

Swedish territorial sea USS MONTEREY was exercising the right of innocent passage.

Under these circumstances it appears to the Government of the United States that the passage through the Swedish territorial sea of USS THE SULLIVANS and USS MONTEREY on July 5 and 8, 2006 were continuous and expeditious under the circumstances and an exercise of their right of innocent passage under the international law of the sea, and that accordingly there was no violation of section 3 of the Swedish Admission Ordinance, SFS 1992:118, as amended.

d. Canadian maritime Arctic claims

In a letter dated October 27, 2006, from the U.S. Ambassador to Canada David Wilkins to Peter Boehm, Assistant Deputy Minister, North America, Canadian Department of Foreign Affairs and International Trade, Ambassador Wilkins stated the U.S. view that "our icebreakers, in the absence of marine scientific research, would not be required to seek Canadian consent before transiting the Northwest Passage." The letter responded affirmatively to a request to release to Parliament diplomatic notes from the United States in 1999 and 2003 in which the United States sought Canadian consent for transit of the Northwest Passage by U.S. icebreakers intending to conduct marine scientific research.

The letter is set forth below in full. The diplomatic notes at issue are available at *www.state.gov/s/l/c8183.htm.*

This is in reply to your office's request to release to Parliament the texts of the Embassy's Notes No. 437 of July 28, 1999, and No. 310 of March 26, 2003, regarding transit of the U.S. Coast Guard icebreaker [USCG] *Healy* through the Northwest Passage.

The United States has no objection to the release of these notes to Parliament. In light of recent public statements in Canada, and recognizing that Canada does not agree, I wish to take this opportunity to restate the longstanding United States position regarding

Canada's maritime claims in the Arctic and to put these two notes in their proper context.

For the record, the United States sees no basis in international law to support Canada's drawing of straight baselines around its Arctic islands and its claim that all the waters among the Canadian Arctic islands, including the Northwest Passage, are internal waters of Canada.

The Northwest Passage is a strait used for international navigation. Therein, all ships and aircraft enjoy the right of transit passage, in accordance with international law as reflected in the 1982 Law of the Sea Convention. The enjoyment of transit passage is not subject to prior notice to, or permission from, Canada as the State bordering the strait. However, an activity that is not an exercise of the right of transit passage, such as marine scientific research, remains subject to the other applicable provisions of international law.

Canada, consistent with its right as a coastal State under international law, requires that marine scientific research may be conducted in its waters only with its consent. Accordingly, as set out in the Agreement on Arctic Cooperation of January 11, 1988, the United States agrees to seek Canada's consent when U.S. icebreakers intend to conduct marine scientific research as they transit the Northwest Passage.

The Embassy's notes of July 28, 1999, and March 26, 2003, were provided to Canada in accordance with that Agreement.

The Agreement expressly provides that neither it nor any practice thereunder affects the legal views of the two Parties. Thus, the Agreement does not affect the U.S. view that our icebreakers, in the absence of marine scientific research, would not be required to seek Canadian consent before transiting the Northwest Passage.

2. Draft Convention on Wreck Removal

The Legal Committee of the International Maritime Organization ("IMO") during its 92nd session, October 16-20, 2006, considered a revised draft of a Convention on Wreck Removal addressing removal of wrecks that pose hazards to navigation or the marine environment. The text of the draft convention

is available in IMO Doc. LEG 92/4 (July 21, 2006). On September 15, 2006, the United States submitted comments on the draft concerning the rights of non-parties. IMO Doc. LEG 92/4/8. As recorded in paragraph 4.69 of the Report of the Legal Committee on the Work of its Ninety-Second Session, LEG 92/13, the United States explained at that meeting that "the aim behind its submission was to clarify that the Parties to the DWRC had no intention of attempting to alter the rights of States non-Parties that exist under customary international law." Paragraph 4.71 stated that "the Legal Committee agreed, at the request of the delegation of the United States, to include in the report its understanding that the wreck removal convention will not bind, and will not be applicable to, non-Parties who have not consented to be bound, in accordance with the Vienna Convention on the Law of Treaties." The IMO documents referenced here are available at *www.state.gov/s/l/c8183.htm.* Negotiations were scheduled to continue at a diplomatic conference in Nairobi in May 2007. The U.S. comments, set forth in IMO Doc. LEG 92/4/8, follow in major part.

* * * *

General

3. Customary international law, as reflected in UNCLOS, provides only limited authority to a coastal State with respect to wrecks.

4. While States are free to join the DWRC and consent, through being a party to that convention, to subject their flag vessels to the enhanced authority of coastal States provided under that convention, States that do not join it have not consented to the enhanced authority of coastal States provided under that Convention.

5. Parties to the convention cannot legally purport to prejudice the rights of non-Parties under customary international law, even if they do not include a non-prejudice clause in the convention. Nevertheless, it would be desirable to make clear, either specifically or generally, that the Parties have no intention of purporting to prejudice such rights.

6. This could be accomplished either through individual adjustments to specific provisions (such as through the definition of "wreck") or through a general clause making clear the absence of any intent to prejudice the rights of non-parties under customary international law.

Exclusive Economic Zone and High Seas

7. There are several areas in which the DWRC would purport to give greater authority to coastal States Parties, *vis-à-vis* wrecks in the Exclusive Economic Zone (EEZ), than is provided under customary international law.

8. Specifically, article 221 of UNCLOS acknowledges the right of coastal States, pursuant to customary and conventional international law, to take and enforce measures beyond the territorial sea proportional to the actual or threatened damage to protect their coastline, or related interests, from pollution or threat of pollution following upon a maritime casualty which may reasonably be expected to result in major harmful consequences.

9. This provision does not authorize a coastal State to take some of the steps that would be authorized under the DWRC.

10. For example, customary international law provides only limited authority to a coastal State to be able to remove a sunken foreign flag vessel from its EEZ, i.e., if pollution or threat of pollution from the wreck may reasonably be expected to result in major harmful consequences.

11. In contrast, article 10(7) of the DWRC would purport to give the coastal State authority to remove a wreck for reasons that go beyond customary international law, namely also in circumstances where the wreck "poses a danger or impediment to navigation." (See definition of "hazard" in article 1(5)(a)).

12. If "wreck" were defined to exclude vessels of States non-Parties, that would not raise an issue. Parties would be free to subject their vessels to removal on a basis (such as danger to navigation) other than that provided under customary law, as reflected in UNCLOS.

13. However, the definition of "wreck" does not exclude vessels of States non-Parties.

14. As a result, article 10(7) would purport to authorize a coastal State Party, for reasons beyond pollution reasons, to remove vessels, not only of States Parties, but also of States non-Parties. In this respect, the convention would purport to prejudice the rights of non-Parties under customary international law.

15. The DWRC could potentially avoid such overreaching *vis-à-vis* wrecks of non-Party States through an adjustment to the definition of "wreck," a clear statement that the provision does not apply to wrecks of non-Party States, a clear statement that the consent of the flag State in question is required, or a general non-prejudice clause as shown below. None of these is present in the current draft.

16. Second, the DWRC would authorize coastal States to impose financial costs on foreign shipowners, which is not a coastal State EEZ authority provided under customary international law. (Several IMO conventions have been elaborated to fill that gap, most recently the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001).

17. Specifically, article 13(3) permits any State Party to issue insurance certificates for ships not registered in a State Party. It is not clear that this provision applies only to those non-Party ships entering ports of States Parties, as set out in article 13(13).

18. This overreaching *vis-à-vis* non-Parties could be remedied, for example, by:

- Amending the second line of article 13(3) to read "… issued to each ship to which this Convention applies of [……] gross tonnage and above …", and
- Amending the final clause of the second sentence of article 13(3) to read "with respect to a ship not registered in a State Party to which paragraph 13 applies it may be issued or certified by the appropriate authority of any State Party".

Territorial Sea

19. There is one problem in the DWRC concerning the territorial sea. The insurance provision of the DWRC was intended to permit a State Party to apply the relevant provisions of article 13 to its territorial sea.

20. In this regard, it is important to get the language of article 13(2) correct in order to limit that provision to the territorial sea. It needs to refer to waters under its "sovereignty" rather than "jurisdiction" (which can be read to include the EEZ, not just the territorial sea).

Remedies

21. The simplest and surest way to address the issues raised would be a single provision, making clear that there is no intention to purport to prejudice the rights of non-Parties under customary international law.

22. Paragraph 6 of the Secretariat's document, LEG 92/4, provides:

> "The Committee decided to include, as a footnote in the text for further consideration at its next session, a proposal for the inclusion of a new paragraph to article 17 aimed at clarifying that the draft convention does not legally confer any authority upon coastal States with respect to wrecks of States which are not party to the convention, or otherwise interfere with the rights and obligations, (including navigational rights and jurisdiction over flag States) of such States, beyond that provided under customary international law as reflected in UNCLOS."

23. The new paragraph referred to above is quoted in note 24 of the annex to document LEG 92/4 as follows:

> "(2) Nothing in this Convention shall prejudice the rights and obligations of non-State Parties to this Convention, under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea."

24. Ideally, this paragraph would be the only paragraph in article 17.

25. If others also seek a first paragraph, before this paragraph, that addresses the effect of the Convention on States Parties,

then such a paragraph would need to read as paragraph 1 in note 24 of the annex to document LEG 92/4, as follows:

> "(1) Except as provided herein, nothing in this Convention shall prejudice the rights and obligations of States Parties under the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and under the customary international law of the sea."

26. The reason that such a paragraph must begin with "except as provided herein" is that it would not be legally accurate without such an introduction. The Convention will in fact affect the rights of States Parties, in that they are taking on additional obligations and subjecting their flag vessels to coastal State authorities that are not otherwise provided under customary international law.

27. Alternatively, as suggested above, these concerns could be addressed through specific adjustments to individual provisions (such as through definitions that exclude vessels of non-Party States or other means).

28. Finally, it should be noted that, although some have suggested that the convention should incorporate a provision tracking article 16 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, (same as in the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001) or the preambular paragraph from the Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation, neither clearly addresses this issue.

29. Those provisions make no distinction between States that are Parties to that treaty and those that are not. In this case, States that become Parties to the Wreck Removal Convention are agreeing to prejudice their rights in certain ways; for example, they are agreeing that wrecks flying their flag are subject to greater coastal state authority than would be the case if they were not a Party to this Convention. So Parties are not in the same category as non-Parties when it comes to the "prejudice" that flows from this Convention.

30. The language the United States proposes makes the accurate legal statement that Parties are not prejudiced except to the

extent provided in the Convention and that non-Parties are not prejudiced at all.

3. Maritime Labor Convention 2006

On February 23, 2006, the 94th (Maritime) Session of the International Labor Conference, meeting in Geneva, adopted the Maritime Labor Convention 2006 ("MLC"). As explained on the International Labor Organization ("ILO") website:

> At periodic intervals the International Labour Organization holds an extra session of its general Conference, devoted to the maritime sector, to address problems specific to work in that sector.
>
> The 94th (Maritime) Session of the International Labour Conference (Geneva, 7-23 February 2006) has consequently taken as its aim the unprecedented task of adopting a comprehensive international labour Convention to consolidate almost all ILO maritime labour Conventions and Recommendations currently in force—over 60 texts—and set out the conditions for decent work in the increasingly globalized maritime sector.

The Provisional Record and other materials from the 94th session are available at *www.ilo.org/public/english/standards/relm/ilc/ilc94/index.htm*. The text of the MLC as adopted is included as item 7A of the Provisional Record. Records of meetings during the five years of negotiations preceding adoption are available at *www.ilo.org/public/english/dialogue/sector/sectors/mariti/consol.htm*.

The MLC includes sixteen legally binding articles followed by Regulations and a two-part Code made up of Standards as Part A and Guidelines as Part B. Article VI.1. provides that "[t]he Regulations and the provisions of Part A of the Code are mandatory. The provisions of Part B of the Code are not mandatory." Pursuant to VI.2., however, each Member "shall give due consideration to implementing

its responsibilities in the manner provided for in Part B of the Code."

An explanatory note, included in the text at pages 24 and 26, describes the organization and content of the text as excerpted below.

* * * *

1. This explanatory note, which does not form part of the Maritime Labour Convention, is intended as a general guide to the Convention.

2. The Convention comprises three different but related parts: the Articles, the Regulations and the Code.

3. The Articles and Regulations set out the core rights and principles and the basic obligations of Members ratifying the Convention. The Articles and Regulations can only be changed by the Conference in the framework of article 19 of the Constitution of the International Labour Organisation (see Article XIV of the Convention).

4. The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). The Code can be amended through the simplified procedure set out in Article XV of the Convention.* Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations.

5. The Regulations and the Code are organized into general areas under five Titles:

Title 1: Minimum requirements for seafarers to work on a ship
Title 2: Conditions of employment

* Editor's note: The "tacit amendment procedure" authorized for amendments to the Code in Article XV allows an adopted amendment to enter into force for a party through a party's silence or lack of action. In addition, Article XIV provides for amendment of articles and regulations as well as the Code, the first time an ILO convention has provided for amendment to the main body of the convention.

Title 3: Accommodation, recreational facilities, food and catering
Title 4: Health protection, medical care, welfare and social security protection
Title 5: Compliance and enforcement

6. Each Title contains groups of provisions relating to a particular right or principle (or enforcement measure in Title 5), with connected numbering. The first group in Title 1, for example, consists of Regulation 1.1, Standard A1.1 and Guideline B1.1, relating to minimum age.

7. The Convention has three underlying purposes:

(a) to lay down, in its Articles and Regulations, a firm set of rights and principles;
(b) to allow, through the Code, a considerable degree of flexibility in the way Members
implement those rights and principles; and
(c) to ensure, through Title 5, that the rights and principles are properly complied with and enforced.

* * * *

Each national delegation was "composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members," as required by the ILO constitution. Article 3.1., available at *www.ilo.org/public/english/standards/relm/ilc/ilc94/credentials-note.pdf.* The United States delegation, made up of one U. S. government delegate from the Department of State and one from the Maritime Administration of the Department of Transportation ("Marad") and one delegate each from the Seafarers International Union and the Chamber of Shipping of America,[**] all voted in favor of

[**] The U.S. delegation also included non-voting representatives from Marad and the Coast Guard of the U.S. Department of Homeland Security, among others.

adoption of the convention. John Blanck, U.S. delegate from the Department of State, Office of the Legal Adviser, provided the explanation of the U.S. vote, stating:

> The United States believes that this is a historic moment, and a great achievement for the International Labour Organization and the international maritime community: the development of an international set of standards that guarantees seafarers decent working and living conditions. We appreciate the efforts of the participants in this Conference to address US concerns related to the scope of application of the Convention. As stated in the Government group meetings and in the Committee of the Whole, the United States continues to have concerns with the scope of the Convention related to the application to our domestic vessels but, as noted above, we believe this is a historic moment, as the global maritime community has created the fourth pillar to ensure a level playing field and to further marginalize substandard shipping. We look forward to continued careful consideration of this Convention.

Provisional Report, item 17 at 1. The U.S. government had earlier expressed concern about the fact that ships engaged in domestic voyages were generally included within the scope of the convention unless expressly excluded for a particular obligation.

Mr. Blanck's reference to the MLC as the fourth pillar is reflected in the preamble which refers to "international standards on ship safety, human security and quality ship management" in three other relevant conventions: "the International Convention for the Safety of Life at Sea, 1974, as amended, the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended, and the seafarer training and competency requirements in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended."

12-Cummins-Chap12.indd 824 10/22/07 11:45:18 PM

The other U.S. government delegate, Bruce Carlton of Marad, who served as the chairperson of the Committee of the Whole, commented on the enforcement provisions of the MLC, including the inspection regime established in Title V, stating:

> This Convention is unique in that it has teeth. What is fundamentally different about this Convention is that it is about quality shipping. Beyond improving the working conditions of seafarers, it is also about further marginalizing the bad shipowners who end up costing the entire industry. This is a very sound economic benefit for the entire industry.

ILO press release dated February 23, 2006, available at *www.ilo.org/public/english/bureau/inf/pr/2006/7.htm*.

4. Guidelines for the Fair Treatment of Seafarers in the Event of a Maritime Accident

On March 13-17, 2006, a joint IMO/ILO ad hoc Expert Working Group ("EWG") met to develop Guidelines for the Fair Treatment of Seafarers in the Event of a Maritime Accident ("Guidelines"). The EWG convened under the ILO tri-partite format of governments, seafarers, and shipowners described in 3 *supra*. Eight governments, including the United States, were selected by the IMO Legal Committee to represent government interests. In this format, seafarers and shipowners each have a 25% share of the vote, and on the issue of fair treatment of seafarers, they consolidated positions and agreed to vote as a block. Thus, they were able to block any provision and needed only one of the eight governments to prevail on any particular issue. The United States does not view this format as appropriate when the applicable terms of reference primarily address obligations or actions of governments.

The United States submitted draft guidelines for consideration by the EWG. Two other drafts were also submitted: a joint draft by labor and shipowners and a draft by the

International Federation of Ships' Masters Associations, an observer non-governmental organization. The EWG Chair, instructed by comments from the EWG participants, chose to use the draft guidelines proposed by labor and shipowners as the basis for drafting; the United States was able to include significant portions of the U.S. draft, including shipowner and seafarer responsibilities.

On April 27, 2006, the IMO Legal Committee adopted Resolution LEG.3(91) with the Guidelines attached as an annex, and invited States to implement the Guidelines beginning July 1, 2006. On June 26 the Secretary-General circulated the resolution and Guidelines, as further adopted by the Governing Body of the ILO on June 12, 2006, stating that "a review of these guidelines will commence at the ninety-second session of the Legal Committee in October 2006. An ad hoc Working Group will be established to consider concerns raised by a number of countries on application of the new Guidelines." IMO Circular letter No. 2711, attaching Resolution LEG.3(91), available at *www.state.gov/s/l/c8183.htm*.

On August 11, 2006, the United States, Canada, Spain, the Netherlands, and France jointly submitted comments on the Guidelines, as excerpted briefly below. IMO Doc. LEG 92/6/2, available at *www.state.gov/s/l/c8183.htm*.

Background

1 The ninety-first session of the Legal Committee adopted resolution LEG.3(91), which annexed Guidelines on the fair treatment of seafarers in the event of a maritime accident and agreed on the need to keep the Guidelines under review. The Legal Committee also decided to establish, at its next session, an *ad hoc* working group to be tasked with reviewing the Guidelines, taking into account the comments made by the delegations which had expressed concerns at this [the ninety-first] session and any others that may be submitted intersessionally. (document LEG 91/12, paragraph 161).

2 The concerns noted included:

1 [T]here should be a clear statement that the guidelines were not intended to apply following incidents committed

with criminal intent, as previously decided by the Committee at its eighty-ninth session. (document LEG 91/12, paragraph 152);
2 [T]he definition of "maritime accident" might be susceptible to misinterpretation and confusion, as it lacked an expected reference to actual or potential damage or injury. (document LEG 91/12, paragraph 152);
3 [T]he guidelines should be interpreted and applied in conformity with a State's domestic law. (document LEG 91/12, paragraph 152);
4 [T]he right to avoid self-incrimination . . . should be addressed, bearing in mind the existence of two types of investigation, respectively aiming at clearly establishing the circumstances of a maritime casualty and at ascertaining criminal responsibility for its occurrence. (document LEG 91/12, paragraph 155);
5 It should be clarified that the obligation to pay wages rests ultimately upon the shipowner/employer and not upon States. (document LEG 91/12, paragraph 155);
6 [P]aragraph 7 excludes the application of the guidelines to warships or naval vessels only, without making reference to vessels operated by States for noncommercial purposes. (document LEG 91/12, paragraph. 155); and
7 [S]ubparagraph 9.21 proclaims the principle of exclusive flag State jurisdiction in matters of collision or other incidents, and in so doing ignores the jurisdictional rights of other States established by international treaties. (document LEG 91/12, paragraph 155).

* * * *

At its October 2006 meeting, the Legal Committee convened the ad hoc Working Group as expected, but no consensus was recognized on any substantive issues. *See* Report of the Legal Committee on the Work of its Ninety-Second Session, LEG 92/13 at 26-27, available at *www.state.gov/s/l/c8183.htm*. As a result, the Legal Committee decided that it would be premature to amend the Guidelines but that review and monitoring of the Guidelines and terms of reference for the EWG should be kept on its agenda. The EWG has no

present schedule for future work, pending review and consideration of revised terms of reference by the Legal Committee and the ILO Governing Body. The views of the United States on this outcome, recorded in paragraph 6.15 of LEG 92/13, are set forth below.

The delegation of the United States expressed disappointment that the *Ad Hoc* Working Group and the Committee had not agreed to proposals contained in document LEG 92/6/2, since the Guidelines contained critical impediments in the form of legal errors and ambiguities, which meant that its country would be unable to implement them in full, and seafarers might be misled about their rights. This delegation said it was the responsibility of the Legal Committee to ensure such impediments were removed. With this aim, the delegation proposed that review and monitoring of the Guidelines should be kept on the agenda of the Legal Committee. At the same time, the delegation recognized that the Joint IMO/ILO *Ad Hoc* Expert Working Group could also contribute to effective implementation of the Guidelines, and it could support the proposed terms of reference as set forth in the annex to document LEG 92/6.

5. Salvage at Sea

On January 31, 2006, the U.S. Court of Appeals for the Fourth Circuit "ratif[ied] the application [of traditional salvage law] to a historically or culturally significant wreck." *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel . . . believed to be the RMS Titanic*, 435 F.3d 521 (4th Cir. 2006). As explained by the court:

> For over ten years, R.M.S. Titanic, Inc. ("RMST") has functioned as the exclusive salvor-in-possession of the wreck of the *R.M.S. Titanic*, which lies in international waters. In a motion filed on February 12, 2004, RMST requested that the district court enter an order awarding it "title to all the artifacts (including portions of the hull) which are the subject of this action *pursuant to the law of finds*"

(emphasis added) or, in the alternative, a salvage award in the amount of $225 million. RMST excluded from its motion any claim for an award of title to the 1,800 artifacts retrieved from the *Titanic* in 1987 and taken to France—well before this *in rem* action was commenced—asserting that a French administrative agency had already awarded it title to those artifacts. But it did request that the district court declare that, based on the French administrative action, "the artifacts raised during the 1987 expedition are independently owned by RMST."

Following a hearing, the district court entered an order dated July 2, 2004, in which it (1) refused to grant comity and recognize the decision of a French administrator awarding RMST title to the 1987 artifacts, and (2) rejected RMST's claim that it should be awarded title to the artifacts recovered since 1993 under the maritime law of finds. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel . . . believed to be the R.M.S. Titanic*, 323 F. Supp. 2d 724, 744-45 (E.D. Va. 2004).

The Fourth Circuit vacated the district court's order as to the first issue and affirmed as to the second. It remanded the case to the district court "with the recognition that it may apply the principles of traditional salvage law to the wreck of the *Titanic* in a manner that serves either the owner or, absent an owner, the public interest and at the same time provides an appropriate award to the salvor." Excerpts follow from the court's analysis in concluding that traditional salvage law rather than the law of finds applies to historic wrecks at sea.

See also Digest 2004 at 715-16, concerning an international agreement among the United States, Canada, France, and the United Kingdom to protect the *Titanic* wreck site from unregulated salvage operations and *Digest 2001* at 695-97 concerning regulations for future research on, exploration of, and if appropriate, salvage of *RMS Titanic*, 66 Fed. Reg. 18,905 (April 12, 2001).

* * * *

We begin our treatment of RMST's contention by agreeing with the district court that the law of salvage and the law of finds "serve different purposes and promote different behaviors." [*R.M.S. Titanic*, 323 F. Supp. 2d at 736]. . . .

As we have previously described the principles of salvage in this case, . . . the law of salvage gives potential salvors incentives to render voluntary and effective aid to people and property in distress at sea,. . . . Without some promise of remuneration, salvors might understandably be reluctant to undertake the often dangerous and costly efforts necessary to provide others with assistance. . . . For thousands of years, maritime law has acknowledged the need to reward those who freely accept the responsibility of rescuing lives and property at sea. . . .

To secure payment of the salvage award, the law gives salvors a maritime lien on the salved property. *Titanic I*, 171 F.3d at 963. The lien attaches to the exclusion of all others, including other potential salvors as well as the property's true owner. *See id*.; *Amstar Corp. v. S/S Alexandros T*., 664 F.2d 904, 908-09 (4th Cir. 1981). Even as the salvor is given this limited possessory interest in the salved property, the true owner is not divested of title to the property. As we have stated,

> It is critical to note that under salvage law, the salvor receives a lien in the property, not title to the property, and as long as the case remains a salvage case, the lienholder cannot assert a right to title even though he may end up with title following execution or foreclosure of the lien.

Titanic II, 286 F.3d at 204-05.

In addition to the maritime lien that attaches to salved property, a court may grant a salvor the status of exclusive salvor-in-possession over property that has yet to be recovered and may issue an injunction to enforce that status. . . .

Along with granting salvor-in-possession status, the law imposes on salvors the "duties of good faith, honesty, and diligence in protecting the property in [the] salvors' care." *Titanic I*, 171 F.3d at 964. Because a salvor acts on behalf of a true owner, even when that owner has not been identified, it serves as a trustee of the

owner's property and is therefore not permitted to use that property for its own purposes. Consistent with trust-law principles, when the salvor violates that trust, it may forfeit its salvage rights, including the right to exclusive possession and a salvage award. *Id.* at 964.

In stark contrast to the nature and purpose of salvage law, which is an ancient and time-honored part of the maritime *jus gentium*, the law of finds is a disfavored common-law doctrine incorporated into admiralty but only rarely applied. The law of finds expresses the acquisitive principle of "finders, keepers"—namely, that the first finder obtains title over unowned property that it has reduced to its possession.[3] Traditionally, in admiralty, that principle was applied only to objects found in the state of nature, such as marine flora and fauna, that were never previously owned and could thus be reduced to possession by an original "finder." 3A Benedict on Admiralty § 158, at 11-16. More recently, the doctrine has been applied to long-lost and abandoned shipwrecks, which, having once been owned, are no longer the property of anyone and so revert to the state of nature. . . .

Courts, however, have traditionally presumed that when property is lost at sea, title remains with the true owner, regardless of how much time has passed. *See Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 461 (4th Cir. 1992). . . . We have noted only two types of maritime cases in which the presumption against abandonment is overcome: first, those in which property owners expressly relinquish title; and second, those where "items are recovered from ancient shipwrecks and no owner appears in court to claim them." *Columbus-America*, 974 F.2d at 461. . . . The presumption that property lost at sea is not abandoned is based on fundamental notions of property that underlie admiralty's policy favoring the law of salvage over the law of finds. *See Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63, 74 (2d Cir. 1998).

[3] To establish a claim under the law of finds, a finder must show (1) intent to reduce property to possession, (2) actual or constructive possession of the property, and (3) that the property is either unowned or abandoned. *See Hener*, 525 F. Supp. at 356.

To apply the law of finds other than to the most exceptional of circumstances would promote behavior fundamentally at odds with the principles of mutual aid which underlie salvage law. . . . Thus, under a regime where the law of finds were to be applied freely, one who would come upon a lost ship on the high seas would be encouraged to refrain from attempting to save it and to entertain the idea of taking the valuable cargo for himself as a finder. Indeed, a free finders-keepers policy is but a short step from active piracy and pillaging. How long after a ship runs aground would it take under a free finders-keepers policy before scavengers would be crawling over the wreck for property to deprive the owner of his property rights? Because of this tendency to encourage acquisitive behavior, the law of finds is applied sparingly—only when no private or public interest would be adversely affected by its application.

In this case, to change RMST's role from that as salvor-in-possession to that as finder would be momentous. First, RMST would no longer be the trustee of the property that it has salvaged, becoming the owner of the very property that had been placed in its trust by court orders. This breach of the trust relationship would do violence to basic notions of trust law, . . . , and work an injustice to those who had earlier sought unsuccessfully to be salvors, *see, e.g., R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel . . . believed to be the R.M.S. Titanic*, 924 F. Supp. 714, 716 (E.D. Va. 1996). Second, as RMST became finder of the artifacts, court supervision of them would end, and RMST could do what it wished with the property it recovered, despite its earlier promises, which might become difficult to enforce. Finally, such a ruling would open the way to justified claims of unfairness by other would-be finders who are excluded from the wreck site. Urging a consistent application of finds to artifacts and the wreck, these would-be finders would participate in an unsupervised rush to the site to recover anything that could be grabbed, without regard to the site, the remains, to potential claims of ownership by descendants of original owners, and to historical, archeological, and cultural interests.

* * * *

V

In remanding this case to the district court to proceed as a maritime salvage case, we are mindful that the salvage law traditionally

does not have as its object the recovery of historical wrecks for historical, archeological, and cultural purposes. The ancient salvage law that has continued to this day was applied to protect the property and lives relating to ships in distress. While the principles of salvage law apply to shipwrecks, again the purpose was to have the salvor recover property for the owner in a trust relationship. *See Titanic I*, 171 F.3d at 964. Under this understanding, the salvage law "offers a premium, by way of honorary award, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life." *The Henry Ewbank*, 1 Sumn. 400, 11 F. Cas. 1166, 1170, F. Cas. No. 6376 (D. Mass. 1833) (No. 6376).

Thus, when we ask in this case whether RMST's efforts were made for the "prompt and ready assistance to human sufferings"; whether they represent the "chivalry" of the salvage law "which forgets itself in an anxiety to save property, as well as life"; whether they were taken in furtherance of the role of a trustee for the property's owner, we can only respond by questioning whether salvage law is so limited. This point has been noted in recent academic commentary:

> The customary law of salvage cannot easily be applied to historic wreck. Law pertaining generally to wreck is one thing, but law pertaining specifically to historic wreck (underwater cultural heritage) is quite another. The advent of major treasure salvage is so recent that there simply is not applicable custom, let alone a jus gentium that addresses the unique phenomenon of underwater cultural heritage in any coherent way.

James Nafziger, "The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck," 44 Harv. Int'l L.J. 251, 261 (2003). Nonetheless, the salvage law, by default, has continued to be applied to historic wreck in the modern cases. . . .

Some courts have responded to the awkwardness of fit by attempting to treat historic wrecks under the law of finds. *See, e. g., Zych v. Unidentified, Wrecked & Abandoned Vessel*, 811 F. Supp. 1300 (N.D. Ill. 1992). But when we recognize that a case in finds would award outright title to the finder and that the public interest

in long-lost historic wrecks could not be served, we readily conclude that the salvage law is much better suited to supervise the salvage of a historic wreck. Indeed, supervising a historic wreck under the law of finds would leave the court without an ability to regulate what the finder could do with the artifacts found or how it might treat the wreck site. Because the traditional law of salvage, however, involves the creation of a trust relationship between salvor and the court on behalf of the owner, it is not a major step to apply the same principles to historic wreck, creating a trust relationship between the salvor and the court on behalf of the public interest. This of course assumes that the owner no longer exists and its successors or descendants have evidenced no further interest in the wreck. Moreover, any such principles would still yield to one who could establish a right of ownership, if not barred under other relevant defenses.

This application of salvage law to historic wrecks would not significantly change a salvor's role—it would still report to the court and ultimately receive an appropriate award. Moreover, it would effect no change in RMST's role. RMST has voluntarily and openly pursued its functions as a trustee for the public interest, and the district court has repeatedly accepted that offer. . . .

* * * *

While we have by default applied traditional salvage law to historic wrecks, both earlier in this case and in prior cases, we now ratify this application as appropriate to a historically or culturally significant wreck. When no person has made a claim to a historical wreck's ownership and any insurance company that has paid a loss in connection with the wreck has relinquished its interest, the court may appoint the plaintiff to serve as salvor to further the public interest in the wreck's historical, archeological, or cultural aspects and to protect the site through injunctive relief, installing the salvor as its exclusive trustee so long as the salvor continues the operation. The court may, in addition to the traditional salvage remedies, also enter such orders as to the title and use of the property retrieved as will promote the historical, archeological, and cultural purposes of the salvage operation. Indeed, to that end the salvor might be able to obtain public or private funding. Finally, the court must

include in its remedies a design to provide the salvor with an appropriate reward, which may include awards in specie, full or restricted ownership of artifacts, limitations on use of the artifacts, rights to income from display and shared research, and future rights to salvage.

Of course, if a claim to ownership of a historic wreck is affirmed, then the salvor continues in a trust relationship to the owner, as with any salvage operation.

In recognizing the applicability of salvage law to historic wrecks, we do not create a new cause of action or a new category of salvor. Rather we are explicitly acknowledging the application of salvage law to historic wrecks—an application that has been ongoing now for years—for the purpose of formalizing the salvage trust of historic wrecks and better informing the appropriate participation in such a trust. . . .

* * * *

6. Long-Range Identification and Tracking of Ships

The 81st meeting of the International Maritime Organization Maritime Safety Committee ("MSC"), meeting May 10-19, 2006, in London, adopted an amendment to the International Convention for the Safety of Life at Sea, 1974 ("SOLAS") on long-range identification and tracking of ships ("LRIT"). The LRIT regulation, which is included in SOLAS Chapter V on Safety of Navigation, provides for the global identification and tracking of ships. *See generally www.imo.org/About/mainframe.asp?topic_id=1320&doc_id=6335.*

As indicated in the report of the Working Group on Maritime Security, MSC 81/WP.5/Add.1., the United States, Brazil, and Norway agreed to formally withdraw their own previous proposals in favor of an alternative text unanimously agreed by the Group. The report also recorded the following understanding among the working group:

> The Group understood that the proposed SOLAS regulation on LRIT established a multilateral agreement for

sharing LRIT information amongst SOLAS Contracting Governments. Such an agreement should meet the maritime security needs and other concerns of the SOLAS Contracting Governments. It maintained the right of flag States to protect information about the ships entitled to fly their flag where appropriate, while allowing coastal States' access to information about ships navigating off their coasts. The proposed SOLAS regulation on LRIT was not creating or affirming any new rights of States over ships beyond what was existing in international law, particularly UNCLOS, nor was it altering or affecting the rights, jurisdiction, duties and obligations of States in connection with the law of the sea.

Excerpts below from the U.S. intervention delivered at the May meeting focus primarily on the coastal State access issue. The full text of the U.S. intervention is available in Annex 42 to the report of the May meeting, MSC 81/25/Add.2, available at *www.state.gov/s/l/c8183.htm*. At this meeting the Maritime Safety Committee also adopted "Performance Standards and Functional Requirements for the Long-Range Identification and Tracking of Ships" by MSC resolution MSC.210(81), Annex 13 to MSC 81/25/Add.1.

---

* * * *

. . . The draft SOLAS amendments under consideration at this session will bring the maritime industry into a new era of transparency and maritime domain awareness. It will benefit *all* maritime nations and legitimate maritime interests by providing information that is not only relevant to security but is also relevant to safety.

The increased transparency that it will provide will also benefit the free flow of commerce as it will help avoid delays associated with increased enforcement efforts of the port States that seek to counter the effects of the community's long-standing tradition of maintaining anonymity. Simply stated, by making legitimate trade transparent, we can focus more of our efforts on those vessels that present anomalies.

Mr. Chairman, we have all worked very hard to find agreeable text for this important amendment over the course of the last four years and I commend all of those who have helped shape this amendment. Clearly, the most difficult of all of the provisions to agree upon has been the issue of a coastal State's access to LRIT information. The United States originally proposed a distance of 2,000 nautical miles for this purpose. That figure was contained in our submission MSC 80/3/3 which remains under consideration at this session. We now have before us two additional proposals for coastal State access to LRIT information—one for a much smaller distance of 200 nm, submitted by the distinguished delegation of Brazil, and a second—compromise text—agreed to by most delegations at the LRIT Intersessional Working Group. That compromise proposal is for a distance of 1,200 nm and is submitted by the distinguished delegation of Norway. We support that proposal although 2,000 nm remains our preference.

Mr. Chairman, no delegation has submitted a paper suggesting that the coastal State should *not* have access to LRIT information; it appears that it is only a matter of the appropriate distance and the basis for granting such access that remains under discussion.

I would like to also point out that although the United States originally proposed the LRIT amendment at MSC 78 for the sole purposes of security, we are now convinced of the potential benefits that LRIT could provide for the safety of life at sea. Let me reference the Communiqué of the Ninth Asia Pacific Heads of Maritime Security Agencies Forum that strongly supported the use of LRIT by Search and Rescue services. And I quote: "The Forum urges the IMO to have the Maritime Safety Committee consider as large a distance as possible for LRIT information in order to give the SAR Regional Centers the most comprehensive data possible."

Mr. Chairman, without a coastal State LRIT element there would be no need for comprehensive mid-ocean tracking of vessels and lives could needless[ly] be lost in our search and rescue efforts. An LRIT system with a coastal State element, as suggested by APHMSA Forum, would have the greatest benefit for not only security, but also for safety.

Mr. Chairman, the United States delegation supports the addition of the coastal State element to the LRIT system—but only at

a distance that provides meaningful security and safety benefits. We respectfully request that all draft SOLAS amendments be referred to the Maritime Security Working Group, one final time, to determine if it is possible to gain consensus on this very important issue.

At the 82nd session of the Maritime Safety Committee from November 29-December 8, 2006, the MSC decided to continue work of the ad hoc working group on engineering aspects of LRIT and appointed the International Mobile Satellite Organization ("IMSO") as the LRIT Co-ordinator. *See* Chapter 7.B.3. The Committee stated that "LRIT is intended to be operational with respect to the transmission of LRIT information by ships as from 31 December 2008." The Committee adopted "Interim Technical Specifications" that are contained in MSC circular MSC.1/Cir.1219, December 15, 2006, available at *www.imo.org*. A brief report of the 82nd session is also available at *www.imo.org*.

7. Operational Procedures for Boarding and Inspecting Certain Vessels

On August 30, 2006, the United States and Ecuador signed the Operational Procedures for Boarding and Inspecting Vessels Suspected of Illicit Traffic in Narcotic Drugs and Psychotropic Substances and of Smuggling Migrants by Sea. The procedures were adopted in light of Ecuador's 200-nm territorial sea claim, but do not address and are without prejudice to the continued U.S. objection to this claim. *See Digest 2004* at 700-02; *Cumulative Digest 1991-1999* at 1584.

The full text of the procedures, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

4. As authorized by Article 17(9) of the [UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("1988 Convention"] and Article 17 of the [Protocol against the Smuggling

of Migrants by Land, Sea and Air to the 2000 United Nations Convention against Transnational Organized Crime ("Protocol")], bilateral agreements or arrangements can be concluded to carry out, or to enhance the effectiveness of, their cooperation.

5. According to the aforementioned international instruments, other applicable rules of international law, and both countries' legislation on sovereignty and jurisdiction over their maritime space, the Participants intend to apply these operational procedures when personnel of the Ecuadorian Navy or of the United States Coast Guard (hereafter, law enforcement officials) aboard warships of their country encounter a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of the State of the other Participant, about which they have reasonable grounds to suspect the vessel is engaged in illicit traffic by sea of narcotics and psychotropic substances and/or smuggling of migrants by sea (hereafter, suspect vessel).

* * * *

8. Whenever law enforcement officials of one Participant (hereafter, the Requesting Participant) encounter a suspect vessel claiming registry or nationality in the other Participant (hereafter, the Requested Participant), they may request . . . verification of the suspect vessel's registry, and in case it is confirmed, the Requested Participant's authorization to board and search the vessel. . . .

9. When the Requested Participant does not have sufficient information to confirm the nationality or registration of the suspect vessel, law enforcement officials of the Requesting Participant may, in accordance with international law and acting under its own responsibility, board the vessel to confirm its nationality. . . .

10. When the Requesting Participant takes measures against a vessel that it has been authorized to board and inspect, it should be responsible for and ensure in accordance with Article 8 of the 2000 Protocol, Article 17(5) of the 1988 Convention and other applicable rules of international law that:

a. The safety and humane treatment of the persons on board are protected;

b. The vessel and its cargo are not unduly endangered;

c. The commercial or legal interests of the State of the Requested Participant or of any other interested State are not harmed; and

d. To the extent permitted by available means, the measures adopted with respect to the vessel are environmentally sound.

11. When rescue is required owing to an imminent threat to the safety of human life at sea, law enforcement officials present on the scene may immediately render assistance in accordance with their responsibilities under applicable international law. . . .

12. Narcotic drugs and psychotropic substances recovered by a participant on a suspect vessel are subject to the control and jurisdiction of the State of the flag of the vessel. The recovering Participant should make such contraband available to the Participant of the State of the flag of the suspect vessel as evidence for a criminal prosecution or other judicial proceeding as appropriate under its domestic laws.

13. If the grounds for the measures taken under the 1988 Convention and the Protocol prove to be unfounded, then the Participants intend for the Requesting Participant to provide effective and timely recourse in respect of any claims for damages to the vessel for any loss or harm that results. . . .

* * * *

B. OUTER SPACE

1. U.S. National Space Policy

On August 31, 2006, President George W. Bush authorized a new national space policy to govern the conduct of U.S. space activities. The new policy supersedes Presidential Decision Directive/NSC-49/NSTC-8, dated September 14, 1996. A ten-page summary of the new policy was released on October 6, 2006, by the Office of Science and Technology Support, Executive Office of the President. Excerpts below from the summary of the new policy provide the principles applicable to U.S. space programs and activities. Other sections address U.S. Space Policy Goals, General Guidelines, National Security

Space Guidelines, Civil Space Guidelines, Commercial Space Guidelines, International Space Cooperation, Space Nuclear Power, Radio Frequency Spectrum and Orbit Management and Interference Protection, Orbital Debris, Effective Export Policies, and Space-Related Security Classification. The full text of the summary is available at *www.ostp.gov/html/US%20National%20Space%20Policy.pdf.*

* * * *

2. Principles

The conduct of U.S. space programs and activities shall be a top priority, guided by the following principles:

- The United States is committed to the exploration and use of outer space by all nations for peaceful purposes, and for the benefit of all humanity. Consistent with this principle, "peaceful purposes" allow U.S. defense and intelligence-related activities in pursuit of national interests;
- The United States rejects any claims to sovereignty by any nation over outer space or celestial bodies, or any portion thereof, and rejects any limitations on the fundamental right of the United States to operate in and acquire data from space;
- The United States will seek to cooperate with other nations in the peaceful use of outer space to extend the benefits of space, enhance space exploration, and to protect and promote freedom around the world;
- The United States considers space systems to have the rights of passage through and operations in space without interference. Consistent with this principle, the United States will view purposeful interference with its space systems as an infringement on its rights;
- The United States considers space capabilities—including the ground and space segments and supporting links—vital to its national interests. Consistent with this policy, the United States will: preserve its rights, capabilities, and freedom of action in space; dissuade or deter others from either

impeding those rights or developing capabilities intended to do so; take those actions necessary to protect its space capabilities; respond to interference; and deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests;

- The United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space. Proposed arms control agreements or restrictions must not impair the rights of the United States to conduct research, development, testing, and operations or other activities in space for U.S. national interests; and
- The United States is committed to encouraging and facilitating a growing and entrepreneurial U.S. commercial space sector. Toward that end, the United States Government will use U.S. commercial space capabilities to the maximum practical extent, consistent with national security.

* * * *

On December 13, 2006, Robert G. Joseph, Under Secretary for Arms Control and International Security, addressed the George C. Marshall Institute in Washington, D.C. on the President's national space policy. The full text of his remarks, excerpted below, is available at *www.state.gov/t/us/rm/77799.htm*.

---

* * * *

The New National Space Policy

At its most basic level, U.S. space policy has not changed significantly from the beginning of our ventures into space. Consistent with past policies, the United States does not monopolize space; we do not deny access to space for peaceful purposes by other nations. Rather, we explore and use space for the benefit of the entire world. This remains a central principle of our policy.

What the new policy reflects, however, are increased actions to ensure the long-term security of our space assets in light of new

threats and as a result of our increased use of space. It establishes the goal of ensuring access to space-based imaging, communication, and positioning, navigation, and timing assets which are critical to fulfilling the full range of diplomatic, information, military, and economic activities that the United States undertakes.

* * * *

The new policy also gives prominence to several goals only touched upon in previous policy documents, including: strengthening the space science and technology base, developing space professionals, and strengthening U.S. industrial competitiveness, especially through use of U.S. commercial space capabilities. . . .

* * * *

Importance of Space Assets to the Global Economy and National Security

* * * *

Our new policy, like the 1996 policy, reiterates the principle that the U.S. is committed to free access and use of space by all nations. We reaffirm that space systems, used for peaceful purposes, must be able to pass through, and operate in, space without interference, and that peaceful purposes includes defense and intelligence-related activities. Though most of the assets in space are from a few countries, there is wide use of commercial imagery, communications, weather, and navigation, among many nations. Therefore, it is in our common interest to deter hostile states from impeding access to, or use of space for peaceful purposes.

Threats to U.S. Space Assets

Space systems are, by their very nature, vulnerable to a range of threats. Space is a harsh environment in which to operate. Meteors, solar flares, and debris can cause harm to our space assets. Other threats are man-made. These threats include jamming satellite links or blinding satellite sensors, which can be disruptive or can temporarily deny access to space-derived products. Anti-satellite weapons—whether kinetic or conventional—or Electro-Magnetic Pulse (EMP) weapons can permanently and irreversibly destroy satellites. Military force can be employed against

ground relay stations, communication nodes, or satellite command and control systems to render space assets useless over an extended period of time. Adversaries can also employ denial and deception techniques to confuse or complicate our information collection.

Moreover, the ability to restrict or deny our freedom of access to, and operations in space is no longer limited simply to nation states. With knowledge of space systems, their orbits, and the means to counter them being readily available, both state and non-state actors can acquire or develop knowledge about our systems, their capabilities, and how to disrupt or destroy them. For instance, non-government satellite observers track satellites and post their orbits on the Internet. Terrorist groups might employ GPS jammers; or our ground stations and communications nodes could be disabled or destroyed by terrorists using, for example, rocket-propelled grenades. Terrorists, like state adversaries, understand our vulnerabilities and have targeted our economy in the past, as they did on 9/11. Thus, our space infrastructure could be seen as a highly lucrative target and today more actors have greater access to increasingly sophisticated technologies and capabilities that will improve their ability to interfere with U.S. space systems, services, and capabilities.

For our part, we must take all of these threats seriously because space capabilities are essential or "vital" to the operation of our telecommunications, transportation, electrical power, water supply, gas and oil storage and transportation systems, emergency services, banking and finance, and continuity of government services. And, just as the U.S. Government reserves the right to protect these infrastructures and resources on land, so too do we reserve the right to protect our space assets. This principle, in fact, was first established for the United States by President Eisenhower and is enshrined in the 1967 Outer Space Treaty.

Consistent with this principle, the United States views the purposeful interference with its space systems as an infringement on our rights, just as we would view interference with U.S. naval and commercial vessels in international waters.

If these rights are not respected, the United States has the same full range of options—from diplomatic to military—to protect its space assets as it has to protect its other critical assets. There is also a broad range of means, both passive and active, by which

space assets may be protected or the effects of the loss of their services minimized. These means include non-space back-ups, on-board sub-component redundancy, maneuvering, system hardening, encryption, and frequency agility.

The United States is more dependent upon space than any other nation. Recognition of the importance of the activities conducted in space led prior Administrations to state that "unimpeded access to and use of space is a vital national interest." Earlier in the Administration, the Space Commission report highlighted that "the U.S. is an attractive candidate for a space Pearl Harbor," because the political, military, and economic value of our nation's activities in space may provide the motive for an adversary to attack U.S. space assets. Ensuring the freedom of space and protecting our interests in this medium are priorities for U.S. national security and for the U.S. economy.

But not all countries can be relied upon to pursue exclusively peaceful goals in space. A number of countries are exploring and acquiring capabilities to counter, attack, and defeat U.S. space systems. In view of these growing threats, our space policy requires us to increase our ability to protect our critical space capabilities and to continue to protect our interests from being harmed through the hostile use of space.

To achieve this end, the United States needs to remain at the forefront in space, technologically and operationally, as we have in the air, on land, and at sea. Specifically, the United States must have the means to employ space assets as an integral part of its ability to manage crises, deter conflicts and, if deterrence fails, prevail in conflict.

International Cooperation

By maintaining the right of self-defense, the United States is not out to claim space for its own. This is not about establishing a U.S. monopoly of space, as some have asserted. In fact, even a cursory reading of the new policy statement demonstrates the exact opposite. There is significant emphasis on international cooperation throughout the National Space Policy, and in other related policy directives on space transportation, commercial space imagery, space exploration and positioning, navigation and timing.

The new policy recognizes that, as space-related commerce grows, competition will grow as well, and the United States will move to remain competitive in areas where we have economic and security interests.

We are not transitioning away from broader international initiatives like the International Space Station. On the contrary, we are embracing them to a greater degree than ever before. One need only look at NASA for proof of this commitment. . . .

* * * *

In short, the United States does not intend to pursue its objectives in space alone. To the contrary, we will energetically pursue our goals in space exploration, space utilization, and scientific discovery while inviting like-minded partners to join us. President Bush established international collaboration as a key element of his January 2004 Vision for Space Exploration. Likewise, the Global Earth Observation System, mentioned in the National Space Policy, is a major step forward in international collaboration with 55 countries and over 30 international organizations working together to fill observation gaps, provide natural disaster warning, environmental monitoring, and improve economic benefits. As the President has stated, the Vision for Space Exploration is a journey, not a race, and we call on other nations to join us on this journey, in a spirit of cooperation and friendship.

The Outer Space Treaty, drafted almost 40 years ago, is at least as relevant and applicable today as it was then. It has established the guiding principles for space operations by which we believe all nations should conduct themselves. We assess that these principles work. A quick look at some of the Treaty's key provisions shows: that space shall be free for all to explore and use; that space activities shall be carried out in accordance with international law, including the Charter of the United Nations, which guarantees the right of self defense. The Treaty also prohibits placing weapons of mass destruction in orbit and prohibits the parties from interfering with the assets of others.

Beyond the Outer Space Treaty, the United States is already a State Party to the Convention on International Liability for Damage Caused by Space Objects, and to the Convention on Registration of Objects Launched into Outer Space, and the Agreement on the

Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space.

Despite the long-standing and effective international space treaty regime, centered on the Outer Space Treaty, there are those who advocate negotiating new multilateral agreements that we believe to be unnecessary and counterproductive. We do not need to enter into new agreements; rather we should be seeking to gain universal adherence to existing agreements, including the Outer Space Treaty, and we should concentrate our efforts on real threats, such as those to the nuclear nonproliferation regime which, as a consequence of actions by Iran and North Korea, are under great strain.

We see no value in proposals such as the Prevention of an Arms Race in Outer Space, commonly referred to as PAROS. Advocates of PAROS argue that we need another international agreement to prevent an arms race in space. There is no arms race in space and we see no signs of one emerging. Instead, we believe our efforts should focus on ensuring free access to space for peaceful purposes and deterring the misuse of space. This does not require a new treaty regime. That is precisely what our National Space Policy states, and we believe that will have more of a deterrent influence than an additional set of international constraints—constraints that would be unverifiable and constrain only those who comply and not cheat.

For our part, we will continue to abide scrupulously by our existing international agreements, including the Outer Space Treaty. Given the vital importance of our space assets, foreclosing technical options to defend those space assets in order to forestall a hypothetical future arms race in space, is not in the national security interest of the United States.

2. UN Committee on Peaceful Uses of Outer Space

a. Recent U.S. activities

The Committee on Peaceful Uses of Outer Space ("COPUOS") met in Vienna in April 2006. Mark Simonoff of the Office of the Legal Adviser, Office of International Environmental and Scientific Affairs, and U.S. Representative to the 45th session of the legal subcommittee of COPUOS, provided the

views of the United States in a series of statements, available at *www.state.gov/s/l/c8183.htm*. In the general exchange of views under agenda item 3, Mr. Simonoff, among other things, provided information on recent activities in the United States "that bear significantly on our space program," as excerpted below.

---

* * * *

The United States (U.S.) Federal Aviation Administration's Office of Commercial Space Transportation (FAA/AST) is laying the foundation for commercial human space flight by developing new regulations supporting this emerging industry. On December 23, 2004, President George W. Bush signed into law the Commercial Space Launch Amendments Act of 2004 (CSLAA). In order to promote the emerging industry, and to create a clear legal, regulatory, and safety regime, the CSLAA extends FAA authority to include regulation of commercial human space flight and, among other things, establishes a new experimental permit regime for development of reusable suborbital rockets.

In December 2005, the FAA issued a Notice of Proposed Rulemaking (NPRM) describing the human space flight requirements for launch and reentry of vehicles with flight crew and space flight participants. The draft rules describe the requirements for crew qualification and training, informing crew and space flight participants of risks, environmental control and life support systems, space flight participant waiver of claims against the U.S. Government, and space flight participant training and security. The public comment period for the proposed rule ended in February and a final rule is expected later this year.

With regard to the U.S. civil space program and our pursuit of the Vision for Space Exploration, NASA is working toward the next launch of the Space Shuttle in July of this year, and has reached agreement with its partners on the International Space Station (ISS) to complete construction of the ISS with the Space Shuttle prior to 2010. In the area of space science, NASA has achieved notable success with space activities that include the continued

operation of the rovers Spirit and Opportunity on the surface of Mars, the recent return of cometary samples to Earth on its Stardust mission, the January 2006 launch of the first-ever robotic mission to Pluto, and the much anticipated arrival in Mars orbit of the Mars Reconnaissance Orbiter just a few weeks ago. NASA's Earth Observation satellites have also contributed a vast amount of data about the Earth's environment including the tracking of changes in the Earth's polar ice sheets and sea ice.

* * * *

b. Registration of space objects

In 2006 the COPUOS legal subcommittee was in the third year of a work plan on agenda item 9, "Practice of States and International Organizations in Registering Space Objects." Mr. Simonoff addressed issues that the subcommittee had agreed would be the focus of the 2006 session, as excerpted below. *See also Digest 2004* at 735-38 concerning U.S. practice in registration of space objects.

---

* * * *

Since the establishment of the UN Register for space objects, activities in space have dramatically increased and changed in nature to include increasing commercial activities. With increasing commercial activity, there has also been an increasing number of commercial transactions involving transfers, between private entities, of ownership or control of space objects.

Mr. Chairman, with regard to the issues that are the focus of the working group's attention this year: In the first instance, we should continue to urge greater adherence to the Registration Convention. This will lead to more launching States taking steps to register government-owned and privately owned space objects. It will also contribute to the ability of international organizations to accept the rights and obligations of the Convention as provided for in Article VII. Regarding practical administrative

measures, we would suggest that States Parties clearly identify a central point of contact for the maintenance of the registry and consider establishing on-line access to that registry. We note that the UN Office for Outer Space Affairs has put the entire UN Register on-line.

We see the non-registration of space objects to be a continuing issue. There are a number of factors that have contributed to this situation. For example, States that are not party to the Registration Convention or international organizations that are unable to accept the provisions of the Convention have no obligation to register their space objects. All Parties to the Registration Convention should ensure that space objects for which they consider themselves to be a launching State are duly registered. In the United States, in recent years, NASA, in its cooperative agreements with other countries' space agencies, has included a provision stating which agency will request that its government register the space object that is the subject of that cooperative agreement.

Regarding registration of "foreign" space objects, the United States believes that it is appropriate for a State to include on its registry all payloads owned or controlled by the State's private or governmental entities and launched from outside that State's territory, unless otherwise agreed by relevant States. In the United States, we have asked U.S. owner/operators to provide the State Department with information needed to include their payloads on the U.S. Registry once the payload is in orbit, regardless of the territory or facility of launch. The Office of Space and Advanced Technology of the Department of State is their point-of-contact. In the case of a non-U.S. payload launched from U.S. territory or facility, the owner/operator should ensure that its payload is included on the Registry of a State Party to the Convention other than the United States or international organization that has accepted the terms of the Convention.

With regard to transfers of space objects, I would like to address the situation in which, as a result of the transfer between private entities, through a lease arrangement, there is also a change in the manner in which those entities are supervised. In the United States, the U.S. Federal Communications Commission has authorized several such transfers in recent years. The FCC's practice is to

consult informally with the relevant agency of the "receiving" State, in order to develop a common understanding concerning the supervision of the private entities involved in the transaction. The consultations address responsibility for licensing and coordination under the ITU's Radio Regulations. The consultations also address whether the satellite will, to the greatest extent possible, maintain the capability to be properly removed from orbit at its end of life. This understanding is then memorialized in a non-binding exchange of letters. Because such transfers do not change the "launching state" of the space object, they do not result in changes to the U.S. Registry of Space Objects.

* * * *

Cross Reference

Space assets protocol to Cape Town Convention, **Ch. 15.A.3.**

Chapter 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT

1. Pollution and Related Issues

a. Climate change

The twelfth conference of the parties to the UN Framework Convention on Climate Change was held in Nairobi, Kenya, in November 2006. Excerpts follow from opening remarks to the conference by Paula Dobriansky, Under Secretary of State for Democracy and Global Affairs and head of the U.S. Delegation. The full text of Ms. Dobriansky's remarks is available at *www.state.gov/g/rls/rm/76056.htm*. *See also* remarks of Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative and alternate head of the U.S. Delegation, available at *www.state.gov/g/oes/rls/rm/2006/75644.htm*.

---

* * * *

I would like to begin my remarks by focusing on some of the principles that guide United States climate change policy. This overview is useful to keep in mind when reviewing the broad range of climate and clean energy initiatives led by the United States in partnership with others.

13-Cummins-Chap13.indd 853 10/22/07 11:45:55 PM

First, the United States is committed to addressing the serious global challenge of climate change. Since 2001, the U.S. Government has committed nearly $29 billion for climate change related activities. This year alone, we will spend more than $3.9 billion to advance practical climate change technologies. And, the President's 2007 Budget for climate change includes an additional $6.5 billion—an increase of 12 percent over the current budget.

Second, we believe that the most effective way forward is to place the complex issue of climate change into the broader context of sustainable development. Our world faces many complex challenges and as we look for strategies to limit greenhouse gas emissions, we must act in ways that also encourage economic growth, advance energy security, reduce poverty, and provide people the health, education and other social structures that are fundamental to the fabric of human life.

Third, United States climate change policy is guided by the belief that multiple solutions are best when grappling with complicated problems. Rather than one plan, we are pursuing many strategies that recognize both the breadth of the issues at hand and the long term nature of the challenge.

Fourth, I would underscore the critical role of science and technology in addressing climate change. These are tools that will enable us to marshal our resources in a strategic way. Future steps to address climate change depend upon advances in science and technology.

Finally, we believe in the power of partnerships. Addressing climate change requires a partnership among all nations. To contribute to the goals of the Framework Convention on Climate Change, the United States is building partnerships with nations that have common goals and we are reaching out to establish public-private partnerships. We welcome industry to join with us in this effort; and indeed, the assets of the private sector are essential to our success. This challenge calls for active participation by all sectors of our society.

* * * *

b. Transboundary water pollution: Teck Cominco

(1) Litigation in U.S. courts

On December 21, 2003, the U.S. Environmental Protection Agency ("EPA") issued a Unilateral Administrative Order ("Order") against Teck Cominco Metals, Ltd. ("Teck"), a Canadian corporation, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. Teck filed a motion to dismiss a citizen suit brought against it to enforce the Order, arguing that CERCLA could not be applied extraterritorially to Teck in Canada. On July 3, 2006, the U.S. Court of Appeals for the Ninth Circuit denied Teck's motion to dismiss. *Pakootas v. Teck Cominco Metals, Ltd*., 452 F. 3d 1066 (9th Cir. 2006). The Ninth Circuit described the suit and its holding in the case as follows:

> The Order requires Teck to conduct a remedial investigation/feasibility study (RI/FS) in a portion of the Columbia River entirely within the United States, where hazardous substances disposed of by Teck have come to be located. . . . We hold that because CERCLA liability is triggered by an actual or threatened release of hazardous substances, and because a release of hazardous substances took place within the United States, this suit involves a domestic application of CERCLA. Further, we reject Teck's contention that it is not liable under § 9607(a)(3) because it disposed of the hazardous substances itself.

The court also took judicial notice of a settlement agreement entered into between Teck and the EPA in 2006 (discussed below), in which the EPA agreed to withdraw the Order at issue. The court noted, however, that neither Pakootas nor the State of Washington (which had intervened in the case in 2004 also seeking to enforce the order) were parties to the settlement agreement. The court stated: "The parties are agreed that the settlement between Teck and the

EPA does not render this action moot" although they disagreed as to the effect on particular claims.

Excerpts below from the Ninth Circuit opinion address its conclusion that the case involves a domestic rather than extraterritorial application of CERCLA (footnotes omitted).

On November 6, 2006, the Ninth Circuit granted a stay of mandate to enable Teck Cominco to file a petition for a writ of certiorari in the Supreme Court.

---

* * * *

Teck's primary argument is that, in absence of a clear statement by Congress that it intended CERCLA to apply extraterritorially, the presumption against extraterritorial application of United States law precludes CERCLA from applying to Teck in Canada. We need to address whether the presumption against extraterritoriality applies only if this case involves an extraterritorial application of CERCLA. . . . CERCLA liability attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a "release" or "threatened release" of a hazardous substance from the facility has occurred, § 9607(a)(4); and (3) the party is within one of the four classes of persons subject to liability under § 9607(a).

CERCLA defines the term "facility" as, in relevant part, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9). The Order defines the "facility" in this case as the Site, which is described as the "extent of contamination *in the United States* associated with the Upper Columbia River." [*In re Upper Columbia River Site*, Docket No. CERCLA-10-2004-0018, at 2 (Unilateral Administrative Order for Remedial Investigation/Feasibility Study Dec. 11, 2003), ("UAO")] at 2 (emphasis added); *see also* UAO at 5. . . . The slag has "come to be located" at the Site, and the Site is thus a facility under § 9601(9)(A). . . . The Order defines the facility as being entirely within the United States, and Teck does not argue that the Site is not a CERCLA facility. Because the CERCLA facility is within the United States, this case

does not involve an extraterritorial application of CERCLA to a facility abroad. . . .

The second element of liability under CERCLA is that there must be a "release" or "threatened release" of a hazardous substance from the facility into the environment. *See* § 9607(a)(4). . . . CERCLA defines a "release," with certain exceptions not relevant here, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." § 9601(22).

* * * *

. . . We hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release. That release—a release into the United States from a facility in the United States—is entirely domestic.

The third element of liability under CERCLA is that the party must be a "covered person" under § 9607(a). . . .

The text of § 9607(a)(3) applies to "any person" who arranged for the disposal of hazardous substances. The term "person" includes, *inter alia*, "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity." § 9601(21). On its face, this definition includes corporations such as Teck, although the definition does not indicate whether foreign corporations are covered. Teck argues that because the Supreme Court recently held that the term "any court" as used in 18 U.S.C. § 922(g)(1) does not include foreign courts, we should interpret the term "any person" so as not to include foreign corporations. *See Small v. United States*, 544 U.S. 385, 390-91, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005).

The decision in *Small* was based in part on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L. Ed. 471 (1818), in which Chief Justice Marshall held for the Court that the words "any person or persons," as used in a statute prohibiting piracy on the high seas, "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *Id.* at 631. . . .

Palmer relied upon two benchmarks for determining whether terms such as "any person" apply to foreign persons: (1) the state

must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. . . . Because there is specific personal jurisdiction over Teck here [under Washington State's longarm statute, Wash. Rev. Code § 4.28.185] based on its allegedly tortious act aimed at the state of Washington, the first *Palmer* benchmark is satisfied, and we can appropriately construe the term "any person" to apply to Teck.

The second *Palmer* benchmark is that the legislature must intend for the statute to apply to the situation. Except for the statutory definition of "any person," CERCLA is silent about *who* is covered by the Act. But CERCLA is clear about what is covered by the Act. CERCLA liability attaches upon release or threatened release of a hazardous substance into the environment. CERCLA defines "environment" to include "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air *within the United States or under the jurisdiction of the United States*." § 9601(8) (emphasis added). CERCLA's purpose is to promote the cleanup of hazardous waste sites where there is a release or threatened release of hazardous substances into the environment within the United States. *See ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1096-98 (9th Cir. 2005) (citing legislative history demonstrating that Congress intended CERCLA to apply to cleanup hazardous waste sites in the United States). Because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazardous substances into the United States environment, the second *Palmer* benchmark is satisfied here.

* * * *

The location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases or threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances. . . .

* * * *

CERCLA is only concerned with imposing liability for cleanup of hazardous waste disposal sites where there has been an actual or threatened release of hazardous substances into the environment. CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them liable for cleanup costs; regulating disposal activities is in the domain of [the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k] or other regulatory statutes.

We hold that applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country.

* * * *

(2) U.S.-Canada agreement

The settlement agreement between Teck-Cominco and EPA referred to in the Ninth Circuit opinion was completed on June 2, 2006. It was agreed that the RI/FS process would provide for an "enhanced consultative role" of the Canadian Government, arrangements for which were completed by an exchange of notes. This exchange of notes was accomplished in letters of July 18 and July 21, 2006, between Terry A. Breese, Director, Office of Canadian Affairs, U.S. Department of State and Tobias Nussbaum, Director, U.S. Relations Division, Foreign Affairs Canada. Excerpts below from Mr. Nussbaum's July 18 letter provide the Canadian proposal, to which the United States agreed. The texts of the two letters are available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The Canadian Government and the United States Government will meet from time to time, at the request of either side, but in any event, not less than once a year, to address any questions or concerns on the Teck Cominco-EPA Agreements, including the human health and ecological risk assessments, until the Teck Cominco

EPA Agreements have been implemented or are no longer in effect. The U.S. and Canadian delegations for these consultations will consist of federal representatives nominated by their respective government. For the purpose of Canada's enhanced consultative role, "Teck Cominco-EPA Agreements" means all agreements between Teck Cominco and EPA addressing the contamination of the Columbia River above the Grand Coulee Dam.

On an ongoing and timely basis, the U.S. Government will share information, data, results and conclusions from the implementation of the Teck Cominco EPA Agreements with Canada. Any such information, data, results and conclusions that are designated by the U.S. or Canadian Governments as being classified, proprietary or otherwise not in the public domain, will be given appropriate protection in accordance with freedom of information and access to information laws. Any U.S. or Canadian government official given access to the information will, as necessary, sign a confidentiality agreement to respect any protected information. In addition, prior to disseminating any information received under this paragraph to any persons not employed by either government, the governments will consult.

To further assist the implementation of the Teck Cominco EPA Agreements, the Canadian Government will consider any request by the U.S. Government to undertake sampling in Canadian waters, permission for which normally would be granted unless the request for sampling is not, in the view of the Canadian Government, related to the sampling and research work being undertaken by Teck Cominco pursuant to the Teck Cominco EPA Agreements or is not scientifically justified.

In the event of any disagreements about proposed courses of action, conclusions or analysis under the Teck Cominco EPA Agreements, any of the government representatives may request consultations. In the event of the disagreements not being resolved at this level, the governments may request through diplomatic channels further consultations which may involve representatives form other government departments and agencies.

c. Comments on Report of the International Law Commission

(1) Transboundary harm arising out of hazardous activities

On October 25, 2006, John B. Bellinger, III, Legal Adviser of the Department of State, addressed the UN Sixth Committee on the Report of the International Law Commission on the Work of its 58th Session. Excerpts follow on the topic "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)." The full text of the statement is available at *www.state.gov/s/l/c8183.htm; see also* Chapter 8. A.1. for Mr. Bellinger's comments on diplomatic protection.

* * * *

We believe that the principles [on international liability for injurious consequences arising out of acts not prohibited by international law] are a positive step toward encouraging States to establish mechanisms to provide prompt and adequate compensation for victims of transboundary harm. They incorporate progressive ideas such as the responsibility of operators, the desirability of backup financial security measures, the importance of prompt response measures, and broad concepts of compensable harm. They also stress the importance of national, bilateral, regional, and sectoral arrangements to carry out these ideas. As a result, they will be an important framework for encouraging State action and for the further development of national and international law on these points.

In addition, we believe that it is particularly appropriate that the principles take the form of non-binding standards of conduct and practice. Indeed, we note and support the commentary's characterization of this document as a "a non-binding declaration of draft principles." As we have remarked previously in this forum, the principles are clearly innovative and aspirational in character rather than descriptive of current law or State practice. At present, there is no consensus on "liability" or loss allocation where injurious

consequences arise from acts not prohibited by international law. As a result, we welcome the Commission's recommendation, encourage the General Assembly to welcome the principles as aspirational standards of conduct and practice, and urge States to take national and international action to implement them. The General Assembly should not take any action to convert them into a convention.

(2) Shared natural resources

On October 30, Elizabeth Wilcox, Deputy Legal Advisor, U.S. Mission to the United Nations, addressed the Sixth Committee on the International Law Commission Report on the issue of shared natural resources, particularly as related to transboundary aquifers. The full text of Ms. Wilcox's statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

* * * *

Before providing our comments on this topic, I should note that we plan to continue our review of the draft articles and commentaries and look forward to considering the views of other governments, including those presented at this meeting. Thus, my comments will only be preliminary.

We believe that the work on transboundary aquifers constitutes an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations.

Nevertheless, as we have noted before, there still is much to learn about transboundary aquifers in general, and specific aquifer conditions and state practice vary widely. For this reason, we continue to prefer context-specific arrangements as the best way to address pressures on transboundary groundwaters. Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate

conditions and expectations; and economic, social, and cultural considerations.

But we recognize that many states have expressed an interest in some form of global framework to guide the negotiation of such arrangements. If this approach is taken, the proposed articles should then take the form of a convention to which states may choose to adhere or not, given the fact that they go well beyond current law and practice. In that event, the text should include appropriate final articles for a convention and additional articles that establish the relationship between this convention and other bilateral or regional arrangements. In particular, the Commission should be careful not to supercede existing bilateral or regional arrangements or to limit the flexibility of states in entering into such arrangements.

Finally, we note the on-going discussion regarding future work on the topic of shared natural resources. Given the complexity of transboundary aquifers as a topic, we believe that the Commission should continue to pursue this aspect of shared natural resources to its completion, rather than introduce new aspects at this juncture. Adding new topics may complicate and lengthen discussions on transboundary aquifers unnecessarily. Once the Commission completes its work on aquifers, we can revisit whether consideration of additional aspects of shared natural resources is worthwhile.

d. Basel Convention on hazardous waste

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal controls the international trade in hazardous wastes. As explained in excerpts from an information sheet made available by the Department of State in 2006, the United States is not yet a party to the convention. Nevertheless, it participates in meetings of the parties, but without a vote. The information sheet, which also describes issues currently being considered by the parties, is available at *www.state.gov/g/oes/env/c18124.htm*.

. . . The Convention, which was adopted in 1989 and entered into force in 1992, was negotiated to establish a "notice and consent" regime for the export of hazardous waste to importing countries. Under the Convention's provisions, trade in hazardous wastes generally cannot take place:

> without the importing country's written consent to a particular export; or where the exporting country has reason to believe that the particular wastes will not be handled in an environmentally sound manner.

Currently, there are more than 160 Parties to the Convention. The United States signed the Basel Convention in 1990. The U.S. Senate provided its advice and consent to ratification in 1992. However, before the United States can ratify the Convention, there is a need for additional legislation to provide the necessary statutory authority to implement its requirements. Until that time, as a non-Party to the Convention, the U.S. participates in the meetings of the Convention Parties, but is not allowed to vote.

The Parties adopted an amendment to the Convention in 1995 to prohibit the export of hazardous wastes, for both recycling and disposal, from countries listed in a new Annex VII to countries not listed in the Annex. This amendment is not yet in force for any Party. The amendment has not been submitted to the Senate for advice and consent, and no Administration has supported it.

Currently debated issues include ship scrapping; classification of, and control systems for, used and scrap electronics; and materials for repair/refurbishment/remanufacturing.

In terms of ship scrapping, the International Maritime Organization (IMO) is currently negotiating a legally binding instrument for the safe and environmentally sound recycling of ships. The U.S. has urged Basel Parties to coordinate internally between maritime and environmental components of government, and participate actively in IMO negotiations to achieve environmentally sound management of ship recycling.

In terms of classifying used and scrap electronics, the current Basel system for controlling international shipments of hazardous waste makes trade in many of these materials difficult, and in some

cases impossible. The U.S. supports consideration of alternative systems of control for "e-waste" under the Convention.

Some Basel Parties are beginning to argue that the Convention applies, in its current form, to the international movement of used products for repair, refurbishment, or remanufacture. The U.S. position is that international movement of equipment for repair, refurbishment, or remanufacturing does not constitute movement of waste, and thus is not impacted by the Convention or its procedures.

e. Chemicals management declaration and strategy

On February 6, 2006, the International Conference on Chemicals Management, meeting in Dubai, concluded a voluntary initiative to assist countries in developing domestic science-based chemical management regimes. A media note issued on February 27, 2006, by the Office of the Spokesman, U.S. Department of State, described the action, welcomed by the United States. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/62205.htm*.

. . . Under the auspices of the United Nations Environment Program (UNEP), governments and a wide range of international organizations and stakeholder representatives participated in these negotiations on a "Strategic Approach to International Chemicals Management (SAICM)."

The negotiators concluded: 1) a High-Level Declaration, also known as the "Dubai Declaration," which notes that SAICM is a voluntary initiative for promoting the science-based management of chemicals; and 2) an Overarching Policy Strategy that outlines SAICM's objectives and its scope, which covers agricultural and industrial chemicals throughout their life-cycle, but explicitly excludes products such as food additives and pharmaceuticals that are regulated by a domestic food or pharmaceutical authority, such as the U.S. Food and Drug Administration. Participants also developed a list of potential activities, known as the "Global Plan

of Action," that could be voluntarily considered as they strive to meet the objective of sound chemicals management.

As a purely voluntary initiative, SAICM does not in any way affect the interpretation or application of rights and obligations that governments have undertaken in international fora such as the World Trade Organization, or through binding international agreements such as the Montreal Protocol. There were attempts during the negotiations to have SAICM influence other international instruments, as well as to expand upon decades-old internationally agreed texts, such as the Rio Declaration, but those attempts were unsuccessful. SAICM merely builds upon already agreed approaches to chemicals management and science-based risk assessment, but importantly seeks to build the capacity of developing countries and economies in transition to safely manage chemicals.

The United States welcomes the conclusion of discussions on SAICM and looks forward to participating in its development, working in partnership with participants, and providing technical assistance to countries in need. As Assistant Secretary of State Claudia McMurray said, "SAICM presents the international community, and particularly developing countries, with a roadmap for achieving the science-based management of domestic chemicals issues. It is a flexible framework that allows countries managing the risks associated with some chemicals to tailor approaches to their individual needs. SAICM recognizes that while we all share the goal of minimizing the risks presented by some chemicals, there are many valid ways to achieve that goal."

f. Protection of stratospheric ozone

Effective January 1, 2005, the U.S. Environmental Protection Agency ("EPA") issued a final rule amending its regulations concerning the phaseout of methyl bromide, one of the ozone-depleting substances covered by the Montreal Protocol on Substances That Deplete the Ozone Layer ("Montreal Protocol"). 69 Fed. Reg. 76,982 (Dec. 23, 2004). After reviewing the applicability of the Montreal Protocol and U.S. implementing legislation in the Clean Air Act, including the exemption

from a requirement to phase out methyl bromide by 2005 in Article 2H(5) of the protocol, the final rule stated:

> With today's final action, EPA is establishing the critical use exemption (CUE) by amending 40 CFR Part 82 to exempt production and import of methyl bromide from the January 1, 2005 phaseout to meet the needs of users who do not have technically and economically feasible alternatives available to them. In today's rulemaking, EPA is describing the framework for the critical use exemption, assigning allowances for critical use methyl bromide, and determining the quantities of exempted methyl bromide allowable under the Clean Air Act (CAA) and the Montreal Protocol.

See Digest 2005 at 719-25.

The Natural Resources Defense Council ("NRDC") petitioned for judicial review of the EPA action in the U.S. Court of Appeals of the District of Columbia Circuit as provided under 42 U.S.C. § 7607(b)(1). On August 29, 2006, the court dismissed the petition, finding that the decisions of the parties to the Montreal Protocol* that NRDC contended were violated by the EPA regulation "are not 'law' within the

---

* The final rule described the relevant decisions of the parties as follows:

> In accordance with Article 2H(5), the Parties have issued several Decisions pertaining to the critical use exemption. At their Ninth Meeting in 1997, the Parties issued Decision IX/6 which established criteria applicable to the critical use exemption. . . .
>
> At the First Extraordinary Meeting of the Parties in March of 2004, the Parties issued several decisions that address the agreed critical uses, the allowable levels of new production and consumption for critical uses, the conditions for granting critical use exemptions, and reporting obligations. Decision Ex. I/3 covers the agreed critical uses and allowable levels of new production and consumption for the year 2005. . . .
>
> The agreed critical uses and allowable levels of production and consumption are set forth in annexes to the Parties' report [including specific exceptions for the United States]. Decision Ex I/4 addresses the conditions for granting and reporting critical-use exemption for methyl bromide.

meaning of the Clean Air Act and are not enforceable in federal court." *Natural Resources Defense Council v. Environmental Protection Agency*, 464 F.3d 1 (D.D.C. 2006). Excerpts from the court's opinion follow (references to submissions in the case and most footnotes are omitted.) The court ruled on issues not briefed by the United States; there is no record of executive branch views on its analysis.

---

* * * *

On the merits, NRDC argues that "EPA's 2005 critical-use rule violates the express terms of the Montreal Protocol Parties' unanimous Decisions,", and therefore is "not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *see Allied Local & Reg'l Mfrs. Caucus v. EPA*, 342 U.S. App. D.C. 61, 215 F.3d 61, 68 (D.C. Cir. 2000).

Decision Ex.I/3, in which the Parties reached agreement on methyl bromide critical-use exemptions for 2005, stated that the United States had a critical need for 8,942 metric tons of methyl bromide. *Id.* Annex II.A. To meet this need, the Parties agreed to allow new production and consumption in the amount of 7,659 metric tons, *id.* Annex II.B, with the remaining critical uses to be met by drawing down existing stocks. *Id.* P 2. The decision also stated that each Party "which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6 are applied" when implementing the exemption, "and that such procedures *take into account available stocks*." *Id.* P 5 (emphasis added). Paragraph 1 of Decision IX/6 directs the Parties to authorize new production and consumption of methyl bromide only if it "is not available in sufficient quantity and quality from existing stocks," Decision IX/6 P 1(b)(ii), and only after "[a]ll technically and economically feasible steps have been taken to minimize the critical use," *id.* P 1(b)(i).

NRDC believes EPA's rule departs from these post-treaty agreements. . . .

NRDC fashions the entirety of its argument around the proposition that the "decisions" under the Protocol are "law." This premise is flawed. The "decisions" of the Parties—post-ratification side

agreements reached by consensus among 189 nations—are not "law" within the meaning of the Clean Air Act and are not enforceable in federal court.

The Clean Air Act authorizes EPA to "exempt the production, importation, and consumption of methyl bromide for critical uses" only "[t]o the extent consistent with the Montreal Protocol." 42 U.S.C. § 7671c(d)(6); *see also id.* § 7671m(b). The Protocol bans the production or consumption of methyl bromide after December 31, 2004, except "to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses." Montreal Protocol art. 2H(5). NRDC argues that because the Clean Air Act requires EPA to abide by the Protocol, and because the Protocol authorizes future agreements concerning the scope of the critical-use exemption, those future agreements must "define the scope of EPA's Clean Air Act authority."

NRDC's interpretation raises significant constitutional problems. If the "decisions" are "law"—enforceable in federal court like statutes or legislative rules—then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution. . . .

* * * *

The legal status of "decisions" of this sort appears to be a question of first impression. There is significant debate over the constitutionality of assigning lawmaking functions to international bodies. . . . A holding that the Parties' post-ratification side agreements were "law" would raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers.

We need not confront the "serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *see also id.* at 250 (Scalia, J., dissenting). It is far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation

of lawmaking authority to annual meetings of the Parties. *Cf. Mistretta v. United States*, 488 U.S. 361, 373 n.7, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

Nowhere does the Protocol suggest that the Parties' post-ratification consensus agreements about how to implement the critical-use exemption are binding in domestic courts. The only pertinent language in Article 2H(5) states that the Parties will "decide to permit" production and consumption necessary to satisfy those uses that they "agree[]" to be critical uses. The Protocol is silent on any specific conditions accompanying the critical-use exemption. Post-ratification agreements setting these conditions are not the Protocol.

* * * *

EPA characterizes the decisions as "subsequent consensus agreements of the Parties that address the interpretation and application of the critical use provision. . . ." Final Rule, 69 Fed. Reg. at 76,985. This may be so. Like any interpretive tool, however, the "decisions" are useful only to the extent they shed light on ambiguous terms in the Protocol. But the details of the critical-use exemption are not ambiguous. They are nonexistent. The "decisions" do not interpret treaty language. They fill in treaty gaps.

Article 2H(5) thus constitutes an "agreement to agree." The parties agree in the Protocol to reach an agreement concerning the types of uses for which new production and consumption will be permitted, and the amounts that will be permitted. "Agreements to agree" are usually not enforceable in contract. . . . There is no doubt that the "decisions" are not treaties.

* * * *

Our holding in this case in no way diminishes the power of the Executive to enter into international agreements that constrain its own behavior within the confines of statutory and treaty law. The Executive has the power to implement ongoing collective endeavors with other countries. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 219-20 (2d ed. 1996). Without congressional action, however, side agreements reached after a treaty has been ratified are not the law of the

land; they are enforceable not through the federal courts, but through international negotiations.

* * * *

g. Emissions controls

During 2006 the United States voiced concerns with a legislative proposal developed by the European Commission's Directorate General for the Environment to extend the EU Emissions Trading Scheme to cover international civil aviation. Under the proposal, all flights arriving and departing from EU airports, including those of non-EU airlines would be included in the scheme. The United States views, provided below, were presented in various fora, including the 12th Session of the Conference of the Parties to the UN Convention on Climate Change, and at the International Civil Aviation Organization ("ICAO") Council.

Unilateral application of an emissions trading scheme for international aviation would be inconsistent with the Chicago Convention, which provides that no fees, dues or other charges may be imposed on foreign aircraft with respect to the right of transit over, entry into or exit from a State's territory. State practice has been to interpret this language, in light of the rest of Article 15, in a way that distinguishes between cost-based charges, which are considered legitimate, and dues or other fees that are not cost-based, which are considered illegitimate. The ICAO Council, in its Resolution of December 6, 1996, endorsed this interpretation of Article 15. Article 15 thus has been interpreted to prohibit the imposition of dues that are not related to the provision of aviation facilities and services. Allowance purchases as envisioned in the EU ETS would be dues impermissible under Article 15 because they would not/not be directly tied to the use of services or facilities.

. . . The U.S. believes that inclusion of emissions generated by foreign airlines in a "domestic" emissions trading system should be on the basis of mutual consent. To that end, the U.S. has urged

the EU to await the outcome of the fall 2007 ICAO Assembly, where states will adopt guidance on emissions trading schemes for international aviation. If the EU must act now, the U.S. has encouraged it to move forward with an approach that would be limited to EU carriers only. In that way, a well-functioning and successful EU system could serve as a model for the rest of the world.

2. Protection of the Marine Environment and Marine Conservation

a. Northwestern Hawaiian Islands Marine National Monument

On June 15, 2006, President George W. Bush issued Presidential Proclamation 8031 establishing the Northwestern Hawaiian Islands Marine National Monument pursuant to § 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. § 431) (the "Antiquities Act"). 71 Fed. Reg. 36,443 (June 26, 2006). As described by the President at the time he issued the proclamation:

> Within the boundaries of the monument, we will prohibit unauthorized passage of ships; we will prohibit unauthorized recreational or commercial activity; we will prohibit any resource extraction or dumping of waste, and over a five-year period, we will phase out commercial fishing as well.

42 WEEKLY COMP. PRES. DOC. 1147 (June 19, 2006). *See also* White House fact sheet issued on the same date, adding that the national monument will, among other things, "[p]reserve access for Native Hawaiian cultural activities" and "[p]rovide for carefully regulated educational and scientific activities." The fact sheet is available at *www.whitehouse.gov/news/releases/2006/06/20060615-9.html*.

The proclamation, which provides that it will be "applied in accordance with international law," is excerpted below.

In the Pacific Ocean northwest of the principal islands of Hawaii lies an approximately 1,200 nautical mile stretch of coral islands, seamounts, banks, and shoals. The area, including the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, the Midway National Wildlife Refuge, the Hawaiian Islands National Wildlife Refuge, and the Battle of Midway National Memorial, supports a dynamic reef ecosystem with more than 7,000 marine species, of which approximately half are unique to the Hawaiian Island chain. This diverse ecosystem is home to many species of coral, fish, birds, marine mammals, and other flora and fauna including the endangered Hawaiian monk seal, the threatened green sea turtle, and the endangered leatherback and hawksbill sea turtles. In addition, this area has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protection and understanding.

* * * *

WHEREAS it would be in the public interest to preserve the marine area of the Northwestern Hawaiian Islands and certain lands as necessary for the care and management of the historic and scientific objects therein,

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Northwestern Hawaiian Islands Marine National Monument (the "monument" or "national monument") for the purpose of protecting the objects described above, all lands and interests in lands owned or controlled by the Government of the United States within the boundaries described on the accompanying map entitled "Northwestern Hawaiian Islands Marine National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved includes approximately 139,793 square miles of emergent and submerged lands and waters of the Northwestern Hawaiian Islands, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including, but not limited to, withdrawal from location, entry, and patent under mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

* * * *

The Secretary of State, in consultation with the Secretaries, shall take appropriate action to enter into negotiations with other governments to make necessary arrangements for the protection of the monument and to promote the purposes for which the monument is established. The Secretary of State, in consultation with the Secretaries, shall seek the cooperation of other governments and international organizations in furtherance of the purposes of this proclamation and consistent with applicable regional and multilateral arrangements for the protection and management of special marine areas. Furthermore, this proclamation shall be applied in accordance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law.

Nothing in this proclamation shall be deemed to diminish or enlarge the jurisdiction of the State of Hawaii.

The establishment of this monument is subject to valid existing rights. . . .

* * * *

Prohibited Activities

The Secretaries shall prohibit persons from conducting or causing to be conducted the following activities:

1. Exploring for, developing, or producing oil, gas, or minerals within the monument;
2. Using or attempting to use poisons, electrical charges, or explosives in the collection or harvest of a monument resource;

3. Introducing or otherwise releasing an introduced species from within or into the monument; and
4. Anchoring on or having a vessel anchored on any living or dead coral with an anchor, anchor chain, or anchor rope.

* * * *

On August 25, 2006, the Departments of Commerce and the Interior issued a final rule, effective immediately to implement Presidential Proclamation 8031. 71 Fed. Reg. 51,134 (Aug. 29, 2006). The Supplementary Information section of the rule stated:

> The Proclamation requires restrictions and prohibitions regarding activities in the Monument consistent with the authority provided by the [Antiquities] Act. The Proclamation shall be applied in accordance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law.

b. Marine wildlife

(1) Pacific Salmon Treaty

On June 30, 1999, the United States and Canada reached agreement through an exchange of notes on a ten-year accord to conserve and manage Pacific salmon found in the waters of both countries. The agreement included amendments to the Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon of January 28, 1985 ("Pacific Salmon Treaty" or "PST"). The notes and attachments are available at *www.state.gov/www/global/oes/oceans/990630_salmon_index.html*; *see also Cumulative Digest 1991-1999* at 1721-25.

On September 12, 2006, the U.S. District Court for the Western District of Washington dismissed claims brought

against the U.S. Department of Commerce and other federal defendants, alleging that they had violated U.S. law "by continuing to allow (by [the Pacific Salmon Treaty]) the harvest by Canadian fishermen of excessive numbers of certain stocks of Chinook salmon from U.S. waters." *Salmon Spawning & Recovery Alliance v. U.S. Department of Commerce*, 2006 U.S. Dist. LEXIS 68955 (W.D. Wash. 2006). Plaintiffs in the case, Salmon Spawning & Recovery Alliance, the Native Fish Society, and Clark-Skamania Flyfishers, alleged that the U.S. government defendants had violated §§ 7 and 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1536(a)(2) and 1538(a)(1)(A), and asked the court to enjoin the U.S. government defendants to comply with the ESA.

Excerpts below from the court's opinion describe the background and claims and provide the court's analysis in dismissing the complaint, concluding that, "[a]s the complaint does not meet either the causation or the redressability requirement [under U.S. law], [plaintiffs] do not have have standing to assert the claims herein."

---

* * * *

. . . U.S. approval of the PST followed agency action which included a study of possible impacts of the treaty on endangered species such as salmon. Pursuant to the ESA, the State Department consulted with [the National Marine Fisheries Service ("NMFS")] on the potential impacts of the treaty. NMFS issued a Biological Opinion ("BiOp") in 1999, concluding that the PST would have a positive effect on the survival of certain endangered Chinook salmon stocks because harvest rates would be reduced (as compared to fishing with no treaty). NMFS thus found that harvest rates under the PST would meet ESA standards.

. . . In 2005, NMFS issued a BiOp regarding Puget Sound fisheries, acknowledging that Canadian harvest of Nooksack River-origin Chinook is well above the rate necessary to rebuild that population. NMFS also noted that combined U.S.-Canadian harvest rates are too high for Chinook originating in other areas . . .

to enable these populations to recover. This 2005 BiOp used different measurement criteria and evaluated certain populations that were not discussed in the 1999 BiOp. . . .

Plaintifffs assert that under Section of the ESA, 16 U.S.C. § 1538, this "taking" of endangered and threatened species is prohibited. They further assert that under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), all federal agencies must ensure that any actions authorized, funded or carried out by them do not jeopardize the continued existence of endangered species. It is Plaintiffs' contention that Defendants' continued participation in implementing the PST, and failure to either withdraw from the Treaty or request modifications, violate the ESA. They ask this Court to enjoin Defendants to comply with the ESA in this matter.

* * * *

Defendants contend that the facts alleged by Plaintiffs, even if true, fail to establish either causation or redressability [as required for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)]. As to causation, the law is that the injury has to be traceable to the action (or inaction) of the defendant, not the result of independent action by a third party. *Lujan*, 504 U.S. at 560. Here, the injury of which Plaintiffs complain is the loss of endangered salmon by overharvesting in Canada. This injury is directly caused by Canadian fishermen, parties who are not before the Court. The connection between that overharvesting and the actions of the Defendants—the issuance of the 1999 BiOp by NMFS and the State Department's negotiation of the Treaty—is simply too attenuated to amount to "causation." While Plaintiffs may speculate that the overfishing would not occur had the Defendants acted differently, the facts stated do not support such speculation. Before the PST, the Canadian fishermen took an even larger share of listed salmon stocks; so it cannot be said that either the BiOp or the Treaty is *causing* the overfishing. The 1999 BiOp simply concluded that the threatened and endangered Chinook stocks would be better off with regulation than without—a conclusion that Plaintiffs cannot, and have not, challenged.

The fact that the harvest levels allowed under the PST are now depleting the stocks may be entirely due to intervening, unnamed

events, such as ocean warming or natural cycles in the salmon population. Further, the direct cause of the injury is the action of Canadian fishermen—independent third parties over whom this Court does not have jurisdiction. Plaintiffs have thus not met the "causation" requirement of the three-element test.

As to redressability, Defendants correctly assert that the Court does not have the power to direct Defendant State Department to re-negotiate the PST to reduce the harvesting of fish by Canadians. This is, as Defendants point out, the "most fundamental problem" with Plaintiffs' claim. Quite simply, this Court lacks jurisdiction to order the State Department to negotiate with a foreign sovereign. . . . Nor may the Court direct the State Department to re-initiate consultation with NMFS, because the section 7(a)(2) duty to consult is triggered only by affirmative agency action, not by inaction. . . . The Court thus has no power to correct the actual injury. . . .

* * * *

(2) Whaling

On October 18, 2006, Iceland announced that it would resume commercial whaling and would issue permits to hunt nine endangered fin whales and 30 minke whales for the year ending August 31, 2007, despite a global commercial whaling ban. U.S. Secretary of Commerce Carlos M. Gutierrez issued a statement on the same date, excerpted below. Secretary Gutierrez' statement is available in full at *www.commerce.gov/opa/press/Secretary_Gutierrez/press_releases.htm#Oct2006.*

See also Digest 2004 at 755-57 concerning U.S. certification that Iceland was undermining the effectiveness of the whaling convention and the International Whaling Commission ("IWC") through its scientific whaling, discussed below, and *Digest 2003* at 243-44, *Digest 2002* at 206-12, and *Digest 2001* at 214-18, concerning U.S. objections to Iceland's reservation to the commercial whaling moratorium in its instrument of adherence to the IWC.

---

* * * *

". . . The United States will closely review this development and in consultation with other countries and stakeholders we will look at options to further promote the conservation of whales and the environment."

"Iceland claims that it is not bound by the moratorium on commercial whaling under the International Convention for the Regulation of Whaling. We object," Gutierrez said, who as Secretary of Commerce, oversees U.S. ocean fishing and conservation of whales and other marine mammals through the National Oceanic & Atmospheric Administration (NOAA).

The United States, along with other like-minded countries, continued to push a pro-conservation position through diplomacy efforts at the June International Whaling Commission meeting in St. Kitts. "This new commercial hunt, preceded by Iceland's research whaling that also yielded meat for commercial sale and export, will further divide the International Whaling Commission and impede progress in that organization," said Dr. Bill Hogarth, U.S. Commissioner to the IWC and Director of NOAA's National Marine Fisheries Service.

The IWC was set up under the International Convention for the Regulation of Whaling on December 2, 1946. The main duty of the commission is to keep under review and revise the measures specified in the Schedule to the Convention—governing conduct of whaling throughout the world.

In 1986 the moratorium on commercial hunting was put in place to allow species of whales to recover from decades of overharvest. Whales experience a wide range of threats including the unintended interaction with fisheries, noise pollution, ship strikes, pollution, plastic debris and habitat loss.

Background

The United States has strongly and repeatedly objected to Iceland's lethal research whaling program, conducted since 2003. Under the Pelly Amendment to the U.S. Fishermen's Protective Act of 1967, the Secretary of Commerce certifies to the President that "nationals of a foreign country . . . are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program."

In 2004 then Commerce Secretary Donald Evans certified Iceland as a country that is undermining the effectiveness of the whaling convention and the IWC through its scientific whaling. That certification remains active.

Minke and fin whales are protected under the U.S. Marine Mammal Protection Act, and fin whales are on the U.S. endangered species list. Furthermore, the hunts for minke and fin whales will be conducted without any transparency about Iceland's compliance measures, enforcement activities, or other management measures in place to ensure their quotas are not exceeded.

The Commerce Department's National Oceanic and Atmospheric Administration is dedicated to enhancing economic security and national safety through the prediction and research of weather and climate-related events, and providing environmental stewardship of America's coastal and marine resources.

(3) Sustainable Fisheries

(i) UN Fish Stocks Agreement Review Conference

The United States chaired the first formal review of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ("UN Fish Stocks Agreement") in New York from May 22-26, 2006. As described in a Department of State media note dated May 18, 2006, the Review Conference took place "in the context of a wide range of recent developments in the field of international fisheries. The meeting presents an opportunity to address growing concerns about the status of fisheries worldwide, including overfishing, illegal fishing and the adverse effects of certain fishing practices on ocean ecosystems." *See www.state.gov/r/pa/prs/ps/2006/66440.htm.*

(ii) Sustainable fisheries resolution

On December 7, 2006, Dr. C. Edward Floyd, U.S. Senior Advisor, addressed the UN General Assembly on Agenda

Item 71(b): Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments. Draft resolution A/61/L.38 on this topic, which Dr. Floyd introduced on behalf of the co-sponsors, was adopted as UN General Assembly Resolution 61/105. Dr. Floyd's remarks, excerpted below, are available in full at *www.un.int/usa/06_388.htm*.

This year's resolution on sustainable fisheries comes at a time of heightened concern about the state of key fish stocks in the world's oceans and the effect of certain fishing practices on the marine ecosystem. We are pleased that this resolution calls for concrete steps to curtail destructive fishing practices; to control illegal, unregulated and unreported (IUU) fishing; to reduce fishing capacity; and to implement the UN Fish Stocks Agreement, among other things. This year, much attention focused on the need for stricter regulation of bottom trawling in areas outside of national jurisdiction. The United States, along with many other countries, had sought a stronger result to address the harm that bottom trawling can cause to vulnerable areas. Nonetheless, we view the provisions contained in the resolution as a welcome and positive step forward. We will continue to work to advance this issue through the relevant regional fisheries management organizations and arrangements (RFMOs), and through negotiations to establish new such organizations where they do not currently exist.

The resolution also endorses the work of the UN Fish Stocks Agreement Review Conference that took place in May of this year. The United States reaffirms its view of the significance of the Agreement and the groundbreaking recommendations of the Review Conference. We urge all States that have not yet become Party to the Agreement to do so. We also believe that the Agreement must continue to be the foundation for negotiating new regional agreements, such as the one currently underway in the South Pacific,

and that its basic principles should also be applied to discrete high seas stocks by all flag States.

Reducing the capacity of the world's fishing fleets continues to be a high priority for the United States. We will push for full implementation of the language in this year's resolution "to urgently reduce the capacity of the world's fishing fleets to levels commensurate with the sustainability of fish stocks." Regarding illegal, unreported, and unregulated fishing (IUU), the resolution recognizes efforts over the past year to address this problem, but further progress continues to be necessary in this area. The upcoming meeting in Kobe, Japan, represents an opportunity to strengthen the way that the five RFMOs managing highly migratory fish stocks address IUU fishing, the management of fishing capacity, and other matters. We also want to see port States take stronger measures to prevent the landing and transshipment in their ports of fish caught in contravention of existing regulatory regimes.

Madame President;

Much work remains if we are to ensure the sustainability of global fish stocks. RFMOs remain the best available mechanism for regulating international fisheries. Nonetheless, there is much room for improvement in the[] way that they work to advance our common goals. To this end, we must embark on a systematic review of their performance. One way forward would be for the meeting in Kobe to agree to review the performance of the five tuna RFMOs, based on common criteria and through a common method.

* * * *

(4) Sea turtle conservation and shrimp imports

On April 28, 2006, the Department of State certified 38 nations and Hong Kong as meeting the requirements of § 609 of Pub. L. No. 101–162, 103 Stat. 988, 1037 (1989), for continued importation of shrimp into the United States. As explained in a media note announcing the certification:

> Section 609 prohibits importation of shrimp and products of shrimp harvested in a manner that may adversely

> affect sea turtle species. This import prohibition does not apply in cases where the Department of State certifies annually to Congress . . . that the government of the harvesting nation has taken certain specific measures to reduce the incidental taking of sea turtles in its shrimp trawl fisheries—or that the fishing environment of the harvesting nation does not pose a threat to sea turtle species. Such certifications are based in part on verification visits made to countries by teams of experts from the State Department and the U.S. National Marine Fisheries Service.

Importation of shrimp from all other nations is prohibited "unless harvested by aquaculture methodology (fish-farming), in cold-water regions where sea turtles are not likely found, or by specialized fishing techniques that do not threaten sea turtles." The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/65731.htm*.

(5) Dolphin-safe tuna fishing

On August 9, 2004, the U.S. District Court for the Northern District of California issued an order staying the implementation of a final finding by the Department of Commerce concerning the use of purse seine nets in the Eastern Tropical Pacific ("ETP"). *Earth Island Institute v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D.Cal. 2004). At issue was a December 31, 2002, finding that

> the intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the ETP. This finding means that the dolphin-safe labeling standard shall be that prescribed by section (h)(1) of the [Dolphin Protection Consumer Information Act]. Therefore, dolphin-safe means that dolphins can be encircled or chased, but no dolphins can be killed or seriously injured in the net in which the tuna was harvested.

68 Fed. Reg. 2010 (Jan. 15, 2003). *See Digest 2004* at 757-62; *Digest 2002* at 794-96.

The United States appealed and filed its opening brief in the U.S. Court of Appeals for the Ninth Circuit in May 2005. On February 3, 2006, the United States filed its Reply Brief for Federal Appellants arguing, among other things:

> The district court erred in setting aside the Secretary's Final Finding that the chase-and-encirclement method of fishing for tuna in the eastern tropical Pacific is not having a significant adverse impact on depleted dolphin stocks. . . . [T]he court applied an erroneous legal standard—the mistaken view that the [International Dolphin Conservation Program Act ("IDCPA")] requires the Secretary to resolve any scientific uncertainty by giving the "benefit of the doubt" to the depleted dolphin species—and failed to give the requisite deference to the agency's choices of methodology and scientific judgments. The court also erred in holding that the Final Finding was based on policy and political concerns rather than the best available science. The court improperly disregarded the Secretary's stated rationale for the finding, which was purely scientific, and instead substituted its own views of the factors motivating the Secretary's decision.
>
> . . . [E]ven if the court's decision setting aside the Final Finding were correct, the remedy ordered by the court is unduly restrictive. Absent extraordinary circumstances, the appropriate remedy under the Administrative Procedure Act for agency action found to be arbitrary or capricious is to vacate and remand to the agency for further proceedings. Here, the court's order effectively prohibits the agency from correcting the alleged deficiencies found by the court, and thus prevents the Secretary from completing his congressionally mandated duties under the IDCPA. Nothing in the IDCPA or the record of this case justifies such a remedy.
>
> . . . Earth Island urges this Court to . . . substitute Earth Island's conclusions about the weight of the scientific

> information in the record for those of the Secretary, rather than addressing the proper question: is there an adequate basis in the record for the *Secretary's conclusions* about the weight of the evidence. As demonstrated in our opening brief, and as discussed further below, the answer to that question is yes. . . .

Earth Island Institute v. Gutierrez, No. 04-17018 (9th Cir. 2006) (emphasis in the original). The full text of the U.S. reply brief is available at *www.state.gov/s/l/c8183.htm*. At the end of 2006 the case remained pending in the Ninth Circuit.

(6) Pollock resources in the Central Bering Sea

The Eleventh Annual Conference of the Parties to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (the "Donut Hole Convention") met in Warsaw, Poland, from September 5-8, 2006. In her opening statement, Patricia A. Livingston, Director, Alaska Fisheries Science Center, Resource Ecology and Fisheries Management Division, commented on the current moratorium on pollock fishing in the Central Bering Sea and objectives for the conference as follows:

> We continue to experience a moratorium on commercial fishing for pollock stocks in the Convention Area. We know that 13 years is not a long time to wait for the recovery of many fish stocks, although it is a long time in the life of a commercial fisherman. We are still operating under Objectives 2 and 3 of the Convention—to restore and maintain the pollock resources in the Bering Sea at levels which will permit their maximum sustainable yield and to cooperate in the gathering and examining of factual information concerning pollock in the Bering Sea.

* * * *

> We understand that three Korean vessels were able to conduct trial fishing in the Central Bering Sea in July and August. We look forward to learning the results of Korea's efforts. We would also like to express our appreciation to Korea for its compliance with the requirements for trial fishing this year.

The full text of Ms. Livingston's statement is reprinted in the Eleventh Annual CBS Conference Report, Appendix 1, pp. 7-8, available at *www.afsc.noaa.gov/REFM/CBS/11th_annual_conference.htm*.

The delegation from Korea presented preliminary results of its trial fishing efforts in the sea, which produced only one pollock, well below the Convention target level. As a result, the annual harvest level ("AHL") was set at zero for the coming year, continuing the moratorium. The two coastal states, United States and Russia, stressed that fishing should not resume, and an AHL should not be set, until pollock stocks have recovered and reached the abundance levels specified in the Convention. The United States noted that pollock biomass is currently near historical low levels and is significantly below the level at which AHL could be set under Convention provisions (this level is indicated as 1.67 million metric tons.)

3. Forests: Debt-for-Nature Agreements

In 2006 the United States signed agreements with Paraguay (June 7), Guatemala (October 2), and Botswana (October 5) to conserve forests in those countries. In each case the agreement provided for reduced debt payments to the United States and commitment of funds to forest preservation. A Department of State media note announcing the signing of the agreement with Botswana, the first such agreement signed with an African country, is excerpted below and available at *www.state.gov/r/pa/prs/ps/2006/73653.htm*.

The Governments of the United States of America and the Republic of Botswana today signed agreements to reduce Botswana's debt payments to the United States by over $8.3 million. These funds will be used to support grants that will conserve and restore important tropical forests throughout the country, including such world famous areas as the Okavango Delta and Chobe National Park region. . . . These are the first Tropical Forest Conservation Act (TFCA) agreements concluded in Africa.

The forests covered by the agreements with Botswana include closed canopy tree cover, riverine forests and dry acacia forests. They are home to the fishing owl, leopard, elephant, hippopotamus and many other wildlife species. People living in and around these forests depend upon them for their livelihood and survival, and these agreements will help ensure the sustainability of the forests for future generations.

The Tropical Forest Conservation Act provides opportunities for eligible developing countries to reduce concessional debts owed the United States while generating funds to conserve their forests. The agreement with Botswana marks the 11th debt-for-nature pact concluded under the Bush Administration. . . . These agreements, together with another TFCA agreement concluded with Bangladesh in 2000, will generate over $135 million in the coming years to protect tropical forests in developing countries.

> In the agreement between Paraguay and the United States, Paraguay committed funds "over the next 12 years to support grants to conserve and restore important tropical forest resources in the southern corridor of the Atlantic Forest of Alto Parana. Special attention will be given to consolidating and enhancing protected areas within the San Rafael National Park Reserve, which contains the richest diversity of native plants and animals in Paraguay." *See* Department of State media note available at *www.state.gov/r/pa/prs/ps/2006/67676.htm*.
>
> In Guatemala agreements were signed by the United States, Guatemala, The Nature Conservancy and Conservation International Foundation, with funds made available by the United States and by The Nature Conservancy and the

Conservation International Foundation. The government of Guatemala agreed to commit funds generated by the reductions in debt "over the next 15 years to support grants to non-governmental organizations and other groups to protect and restore the country's important tropical forest resources." *See* Department of State media note available at *www.state.gov/r/p/prs/ps/2006/73445.htm.*

4. Biological Diversity

The United States participated as a non-party observer at the 8th Conference of the Parties to the Convention on Biological Diversity, held March 26-29, 2006, in Curitiba, Brazil. A Department of State media note dated March 24, 2006, briefly described U.S. positions and explained the U.S. status as follows:

> The primary U.S. objective at the conference in Brazil is to advance the new initiative by the United States to build a Coalition Against Wildlife Trafficking (CAWT) to fight wildlife crime worldwide. The U.S. will also seek to help the Parties to the Convention develop a pragmatic and effective program of work on island biodiversity; to emphasize science-based decision making in all aspects of biodiversity conservation; and to improve the practical application of the Convention's existing voluntary guidelines on access to genetic resources.
>
> There are 189 Parties to the Convention on Biological Diversity, which was opened for signature at the 1992 Rio Earth Summit and entered into force in December 1993. The U.S. signed the treaty in June 1993. Request for Senate advice and consent to ratification was approved by the Senate Foreign Relations Committee in 1994 and the treaty remains before the Senate. . . .

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2006/63694.htm.*

B. MEDICAL AND HEALTH ISSUES

1. Pandemic Influenza: Implementation of U.S. National Strategy

On May 3, 2006, President George W. Bush released the National Strategy for Pandemic Influenza: Implementation Plan. *www.whitehouse.gov/homeland/nspi_implementation.pdf*. As described in a fact sheet issued on that date, the implementation plan "translates the *National Strategy for Pandemic Influenza* into more than 300 actions for Federal departments and agencies and sets clear expectations for State and local governments and other non-Federal entities." The national strategy was announced by the President on November 1, 2005, and is available at *www.whitehouse.gov/homeland/pandemic-influenza.html*.

Excerpts follow from Chapter 4, International Efforts, of the May 3 implementation plan. *See also* Department of State information sheet, "Avian Influenza (H5N1) and Pandemic Influenza" at *www.travel.state.gov/travel/tips/health/health_1181.html#*.

Key Considerations

* * * *

Key Elements of Effective International Response and Containment

* * * *

Agreed Epidemiological "Trigger" for International Response and Containment

* * * *

With disease confirmation, the WHO Director-General would announce a human outbreak of an influenza virus with pandemic potential, after consultation with experts from HHS and scientists from other governments. As outlined above, the basis for announcing a human outbreak of pandemic potential would consider a number of factors, including the number of individuals affected, the rapidity of spread, and the virulence of the disease. An outbreak of an influenza virus with pandemic potential is considered

a Public Health Emergency of International Concern under the revised International Health Regulations, adopted by the World Health Assembly in May 2005.

* * * *

Roles and Responsibilities

* * * *

Individuals and Families

Private Americans who are living or traveling abroad should make personal plans relating to their medical care, ability to address a "stay-in-place" response, and the possibility that international movement will be restricted for public health reasons.

International Partners

Three international organizations play key roles with respect to preparing for, detecting, and containing an outbreak of animal or pandemic influenza. The WHO Secretariat and its Regional Offices and the WHO Influenza Network help build international public health capacity, encourage and assist countries to develop and exercise pandemic preparedness plans, and set international public health standards. The WHO leadership coordinates the international response to an outbreak of pandemic influenza, including through its Global Outbreak Alert and Response Network (GOARN), consistent with the revised International Health Regulations (IHRs) as adopted by the World Health Assembly in May 2005 for entry into force in June 2007, which will govern the obligations of WHO member states to report public health emergencies of international concern to the WHO Secretariat and describe steps countries may take to limit international movement of travelers, conveyances, or cargo to prevent the spread of disease. The OIE and the FAO share the lead on animal health and work with the United States and other nations to detect, respond to, and contain outbreaks of influenza with pandemic potential in animals. The Senior UN System Coordinator for Avian and Human Influenza, appointed by the UN Secretary General in September 2005, will coordinate the efforts of WHO and the full range of UN organizations that may be tapped in the fight against pandemic influenza.

* * * *

2. International Health Regulations

On December 13, 2006, the Secretary of Health and Human Services Mike Leavitt announced that the United States had formally accepted the revised International Health Regulations (IHR) "and will begin the process of implementing these new international rules immediately instead of waiting for them to take effect in June 2007." A press release containing the announcement is excerpted further below and available at *www.hhs.gov/news/press/2006pres/20061213.html. See also Digest 2005* at 768-71 for U.S. statement at the time the World Health Organization adopted the regulations in May 2005.

* * * *

The International Health Regulations are an international legal instrument that governs the roles of the World Health Organization (WHO) and its member countries in identifying and responding to and sharing information about public health emergencies of international concern. The updated rules are designed to prevent and protect against the international spread of diseases, while minimizing interference with world travel and trade. Many of the provisions in the new regulations are based on experiences gained and lessons learned by the global community over the past 30 years.

"As we have seen recently with SARS and H5N1 avian influenza, diseases respect no boundaries. In today's world, a threat anywhere means danger everywhere," Secretary Leavitt said. "The improved global cooperation that will come from implementing these new International Health Regulations represents a major step forward for global public health."

First adopted by WHO Member States in 1969, the current IHRs apply to only three diseases: cholera, yellow fever and plague. However, in recent decades, increases in international travel and trade, along with marked developments in communication technology, have led to new challenges in the control of emerging and re-emerging infectious diseases.

Under the revised regulations, countries that have accepted the IHRs have much broader responsibility to take preventive measures against, as well as to detect and respond to, public-health emergencies of international concern. The regulations give the WHO clearer authority to recommend to its Member States measures that will help contain the international spread of disease, including public-health actions to be taken at ports, airports, land borders and on means of transport that involve international travel.

The revised regulations include a list of four diseases—smallpox, polio, Severe Acute Respiratory Syndrome (SARS) and new strains of human influenza—whose occurrence Member States must immediately report to the WHO. In addition, the regulations provide an algorithm to determine whether other incidents, including those of a biological, chemical or radiological nature, constitute public-health events of international concern. The rules also provide specific procedures and timelines for announcing and responding to public health events of international concern.

Countries that intend to accept the IHRs may submit reservations and understandings regarding their implementation of the Regulations.

The United States has accepted the IHRs with the reservation that it will implement them in line with U.S. principles of federalism. In addition, the U.S. Government has also submitted three understandings, setting forth its views that (1) incidents that involve the natural, accidental or deliberate release of chemical, biological or radiological materials are notifiable under the IHRs; (2) countries that accept the IHRs are obligated to report potential public health emergencies that occur outside their borders to the extent possible; and (3) the IHRs do not create any separate private right to legal action against the federal government.

Following several years of work by the WHO and its Member States, the annual World Health Assembly approved the revised IHRs in May 2005, and agreed the revised regulations will officially take effect in June 2007. More information about the International Health Regulations (2005) is available at http://www.who.int/csr/ihr/en/.

C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

International Fusion Energy Organization

On November 21, 2006, Raymond L. Orbach, Under Secretary for Science of the U.S. Department of Energy ("DOE") and counterparts from China, the European Union, India, Japan, the Republic of Korea and the Russian Federation signed the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project. The text of the agreement is available at *www.iter.org/pdfs/Agreement.pdf.* A statement by Dr. Orbach at the time of signing is excerpted below. The full texts of the signing statement and a news release that follows are available at *www.sc.doe.gov/News_Information/News_Room/2006/ITER/ITER_News_Releases.htm.*

* * * *

ITER is a central component of President Bush's Advanced Energy Initiative to develop abundant, environmentally benign, and cost effective energy sources. President Bush announced that the U.S. was joining the ITER negotiations on January 30, 2003. The President's initiative in joining ITER allows the United States to share, as well as to contribute to, the combined experience and knowledge that will result from the design, construction and operation of this vital project. Signing this agreement brings us one step closer to a viable source of fusion power.

ITER also is the first stand alone, truly international, large-scale scientific research effort in the history of the world. It will serve as a model for future collaborative large scale science projects.

Following the initialing of the Agreement in Brussels on May 24, 2006, the Department of Energy transmitted to Congress the final initialed text to begin the 120-day review required by the Energy Policy Act of 2005. I am pleased to say that, on September 29, 2006, U.S House of Representatives Science Committee Chairman

Sherwood Boehlert wrote to Secretary of Energy Samuel W. Bodman, "I am satisfied that the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project has been negotiated in accordance with the requirements listed in paragraph 972(c)(3)" (of the Energy Policy Act of 2005). . . .

* * * *

A news release from the Department of Energy also dated November 21 provided further information about ITER (Latin for "the way") as excerpted below.

---

* * * *

ITER will be constructed at Cadarache, France and is expected to be completed in 2015. The site is adjacent to the main research center of the French Atomic Energy Commission. The EU, as the host, will provide 45.46 percent of the construction phase funding. The U.S., as a non-host partner, will participate in the construction phase at the level of 9.09 percent. . . . DOE laboratories will subcontract with industry to build the components of ITER for which the U.S. is responsible. The total value of the U.S. contribution is $1.122 billion.

Fusion energy, created when light atomic nuclei are fused together at temperatures greater than those of the interior of stars and far above the melting point of any solid container, could provide significant amounts of electricity and also generate hydrogen that could power fuel cell vehicles of the future. Fusion power has the following advantages:

Fusion is clean: It produces negligible atmospheric emissions and zero greenhouse gas emissions.
Fusion is safe: Reactors cannot "melt down," and do not generate the high-level, long-lasting radioactive waste associated with nuclear fission.

Fusion is renewable: Commercial fusion reactors would use lithium and deuterium, both readily available natural resources.

* * * *

Cross Reference

U.S.-Indonesia illegal logging initiative, **Chapter 11.F.5.**

13-Cummins-Chap13.indd 896 10/22/07 11:46:01 PM

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2006 the United States entered into or extended agreements with Colombia, Cyprus, Bolivia, and Italy to protect the cultural heritage of those countries by restricting the importation of specified cultural property into the United States. The United States took these steps pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), which the United States ratified in 1983 and implements through the Convention on Cultural Property Implementation Act. *See* Pub. L. 97-446, 96 Stat. 2329, 19 U.S.C. §§ 2601-2613. If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 & 2604.

Further information and links to related documents are available at *http://exchanges.state.gov/culprop*.

1. Colombia

The United States and the Government of Colombia entered into a bilateral agreement on March 15, 2006, pursuant to

14-Cummins-Chap14.indd 897 10/22/07 11:46:28 PM

which the United States restricted the import of archaeological materials from the pre-Columbian period as well as ecclesiastical ethnological materials from Colombia's colonial period. 71 Fed. Reg. 13,757-13,766 (March 17, 2006). Internal headings have been omitted from excerpts that follow.

---

* * * *

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). On May 10, 2005, the Assistant Secretary of State for Educational and Cultural Affairs made the determinations required under the statute with respect to certain archaeological materials originating in Colombia that represent pre-Columbian cultures and certain Colonial ecclesiastical ethnological materials. . . . These determinations include the following: (1) that the cultural patrimony of Colombia is in jeopardy from the pillage of irreplaceable archaeological materials representing its pre-Columbian heritage (ranging in date from approximately 1500 B.C. to A.D. 1530) and irreplaceable ecclesiastical ethnological materials of the Colonial period (ranging in date from approximately A.D. 1530 to 1830) (19 U.S.C. 2602(a)(1)(A)); (2) that the Government of Colombia has taken measures consistent with the Convention to protect its cultural patrimony (19 U.S.C. 2602(a)(1)(B)); (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available (19 U.S.C. 2602(a)(1)(C)); and (4) that the application of import restrictions as set forth in this final rule is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes (19 U.S.C. 2602(a)(1)(D)). The Assistant Secretary also found that the materials described in the determinations meet the statutory definition of "archaeological or ethnological material of the state party" (19 U.S.C. 2601(2)).

On March 15, 2006, the United States and the Government of Colombia entered into a bilateral agreement (the Agreement) pursuant to the provisions of 19 U.S.C. 2602(a)(2) covering certain

archaeological materials representing its pre-Columbian cultural heritage and certain ecclesiastical ethnological materials of the Colonial period. . . .

* * * *

In accordance with the Agreement, import restrictions are now being imposed on these archaeological and ethnological materials from Colombia. Importation of these materials . . . are subject to the restrictions of 19 U.S.C. 2606 and Sec. 12.104g(a) of the Customs and Border Protection (CBP) Regulations (19 CFR 12.104g(a)) and will be restricted from entry into the United States unless the conditions set forth in 19 U.S.C. 2606 and Sec. 12.104c of the regulations (19 CFR 12.104c) are met. CBP is amending Sec. 12.104g(a) of the CBP Regulations (19 CFR 12.104g(a)) to indicate that these import restrictions have been imposed.

* * * *

2. Cyprus

The United States and the Republic of Cyprus amended an existing bilateral agreement on August 11, 2006, to extend emergency protections on Byzantine ecclesiastical materials that would otherwise have expired. 71 Fed. Reg. 51724-51726 (Aug. 31, 2006). Accordingly, the United States adjusted its Customs and Border Protection ("CBP") regulations, shifting the Byzantine ecclesiastical materials from the list of import restrictions imposed by emergency action to the list of import restrictions imposed pursuant to a bilateral agreement originally entered into in 2002. Internal headings have been omitted from excerpts below; *see also Digest 2002* at 814-15.

---

* * * *

Pursuant to Article 9 of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and Sec. 303(a)(3) of the Convention on Cultural Property Implementation Act (19 U.S.C. 2602(a)(3)),

a State Party to the 1970 UNESCO Convention, may request that the U.S. Government impose import restrictions on certain categories of archaeological and/or ethnological material the pillage of which, if alleged, jeopardizes the national cultural patrimony.

On March 4, 1999, and in response to the determination that an emergency condition applies with respect to certain Byzantine ecclesiastical and ritual ethnological material from Cyprus, the U.S. Government made the determination that emergency import restrictions be imposed.

These emergency import restrictions were later extended by CBP Dec. 03-25 for an additional three-year period. (See 68 FR 51903, August 29, 2003). These emergency import restrictions are scheduled to expire on September 4, 2006.

* * * *

[T]he United States entered into a bilateral agreement with Cyprus on July 16, 2002, concerning the imposition of import restrictions on archaeological material originating in Cyprus and representing the pre-Classical and Classical periods. . . . The articles that were subject to emergency restrictions in 1999 were not included in the original list designated pursuant to the bilateral agreement.

Since the emergency import restrictions on the Byzantine materials is due to expire on September 4, 2006, the Republic of Cyprus requested, through diplomatic channels, that the Byzantine materials that have been protected by the emergency action continue to be protected in the future by amending the existing bilateral agreement.

After reviewing the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, concluded that the cultural heritage of Cyprus continues to be in jeopardy from the pillage of certain Byzantine ecclesiastical and ritual ethnological materials ranging in date from approximately the 4th century A.D. through approximately the 15th century A.D. from Cyprus.

On August 11, 2006, the Republic of Cyprus and the U.S. Government amended the bilateral agreement of July 16, 2002, pursuant to the provisions of 19 U.S.C. 2602 and Article 4(b) of

the agreement, by including the list of Byzantine ecclesiastical and ritual ethnological material that were protected pursuant to the emergency action in the list of articles protected in the bilateral agreement. . . .

* * * *

Accordingly, CBP is amending 19 CFR 12.104g(b) to remove the above-referenced Byzantine materials from Cyprus from the list of import restrictions imposed by emergency action, and to reference these materials under the listing of cultural property (Sec. 12.104g(a)) protected pursuant to bilateral agreement.

* * * *

3. Bolivia

The United States and the Republic of Bolivia extended an existing Memorandum of Understanding on December 4, 2006, concerning the imposition of import restrictions by the United States on Pre-Colombian archeological materials and ethnological material from the colonial and Republican eras in Bolivia. The import restrictions would have expired in 2006 without a new finding that Bolivia's cultural heritage continued to be in danger of pillage. 71 Fed. Reg. 69,477-69,478 (Dec. 1, 2006); *see also Digest 2001* at 772-74.

4. Italy

The United States in 2006 extended import restrictions on Roman archaeological materials from Italy for five additional years, finding that "the cultural heritage of Italy continues to be in jeopardy from pillage of archaeological material representing the pre-Classical, Classical, and Imperial Roman periods." The import restrictions had been imposed in 2001 following a bilateral agreement with the Italian government, but they would have expired in 2006 without this finding. 71 Fed. Reg. 3000-3001 (Jan. 19, 2006); *see also Digest 2001* at 769-72.

Cross References

Salvage law applicable to historic wrecks, **Chapter 12.A.5.**
Convention on cultural diversity, **Chapter 4.B.1.**

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. Carriage of Goods By Sea

a. Carriage of Goods By Sea Convention

(1) Overview

On March 22, 2006, Mary Helen Carlson, Office of the Legal Adviser, Private International Law, and head of the U.S. delegation in negotiation of the draft UN Commission on International Trade Law ("UNCITRAL") carriage of goods by sea convention, presented the William Tetley Maritime Law Lecture at Tulane Maritime Law Center. In her address, she discussed U.S. practice in private international law and the development and current status of negotiation of the carriage of goods by sea convention. Excerpts below concerning the convention are limited to developments in the last year (footnotes omitted). The full text of Ms. Carlson's Tulane lecture is available at *www.state.gov/s/l/c8183.htm; see also Digest 2005* at 793-99 and *Digest 2004* at 815-18.

---

* * * *

In its broadest sense, "private international law" refers to the international process of unifying or harmonizing the rules that govern

15-Cummins-Chap15.indd 903 10/22/07 11:47:18 PM

international transactions between private parties, in contrast with public international law, which is concerned with relations between governments. Lawyers from the State Department's Office of the Assistant Legal Adviser for Private International Law (L/PIL), of which I am a part, frequently coordinate and lead U.S. participation in international efforts to unify, harmonize or create private law. In many respects, the intergovernmental process of private law unification parallels the domestic process of private law unification in the United States done by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The Uniform Commercial Code is probably the NCCUSL instrument most familiar to you.

The international process of private law unification has been underway for over a century in Europe and Latin America. But in the United States, there was for a long time little interest in this topic. The subject matter of private law is for the most part a matter of individual state law in the United States. It was thought that federalism concerns would make acceptance of private international law conventions politically if not constitutionally difficult for the United States. Law established by treaty would become the law of the land, preempting inconsistent state law.

One important exception to the traditional disinterest in the United States to private international law treaties is the area of most interest to us tonight: the international carriage of goods by sea. It has long been recognized that this trade demands a unified legal regime. In the United States, our Constitution provides that the federal courts and federal law, not individual state courts and laws, govern admiralty and maritime cases. The United States is, of course, party to the [International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("1924 Hague Rules")], which is the first modern unification of certain rules relating to maritime bills of lading in international cases.

* * * *

More and more what we are seeing are private international law conventions that combine substantive law, agreed procedures, and choice of law or choice of forum provisions. The Hague adoption and child abduction conventions are examples. They impose

substantive obligations on the parties to establish certain standards for adoptions, in the first case, and to return a child who has been wrongfully removed or retained, in the latter case. But much of the conventions are devoted to developing procedural mechanisms for cooperation and requirements for the recognition and enforcement of decisions that meet the conventions' standards.

The great benefits of private international law are predictability and efficiency. Often it's less important what the rules are, so long as you *know* what they are and everybody plays by them.

B. What is the United States Approach to Private International Law Projects?

It's a uniquely American approach, perhaps described by two words: participatory and pragmatic. First, participatory:

The Secretary of State's Advisory Committee on Private International Law is the forum by which the State Department, which is the action office for private international law within the U.S. Government, obtains the requisite expertise and guidance on both the general direction the U.S. should take in its efforts, and specific positions the U.S. should pursue in specific pending projects. The Advisory Committee's membership includes representatives from all national legal organizations that have an interest in private international law, including the ABA's sections of International Law, Business Law, and Family Law, the National Conference of Commissioners on Uniform State Laws, the National Association of Attorneys General, the Judicial Conference of the U.S., the Maritime Law Association and many others. For specific pending projects, we turn to groups of experts who make up informal study groups, subgroups of the Advisory Committee. We hold regular meetings of these Study Groups, which are open to the public and are announced in advance in the Federal Register. We also frequently send out documents and updates by email to a mailing list that includes anyone who wants to be on it. This helps to ensure that the views expressed by United States delegations in international negotiations represent a balanced position resulting from the suggestions received from, and concerns expressed by, many, and sometimes competing, elements of the private sector and

responsible government agencies. The members of the U.S. delegation to a particular negotiation are generally chosen from the Study Group. Our delegations are led by an L/PIL attorney, and usually include officials from the relevant federal or other government agencies, academics, lawyers representing the various industry sectors, and non-lawyer industry representatives.

The goal of this very inclusive process is to include every interest group in the process of developing the U.S. position on the various legal and policy issues that arise in each international project. . . .

In private international law, unless there are public or foreign policy interests that are inconsistent with the interests of the affected private sector groups, the U.S. government generally seeks to carry out the goals of those groups. This is at the heart of the difference between U.S. participation in private international law negotiations and that of many other countries. Other countries may prefer to send only government officials to these negotiations; and sometimes these officials express positions that the U.S. private sector advisors know is not the position of the industry representatives in those countries. There often seems to us to be a serious disconnection between a country's delegation in intergovernmental meetings and the elements of their private sector that are supposed to benefit from the convention or model law.

Some countries and experts have very strong doubts about industry participation in the actual negotiation of private international law conventions. They prefer to consult with industry before a negotiating session begins, but not to include industry in their delegations. They believe that allowing the active participation of industry can lead to unprincipled compromises, bad drafting, and a complicated and inconsistent text. My short response to that is: It is probably true that a small group of expert legislative drafters could develop a simple, clear and coherent text more easily without the constant interference and competing demands of industry representatives. But, at least from the U.S. perspective, such a text is much less likely to solve the real-world problems it is supposed to address, and is much less likely to be ratified.

This very active participation of industry is such an important aspect of the U.S. approach to private international law, and

apparently is so unusual, that it is worth considering why the United States approach is so different. Perhaps the main reason why some states do not permit active participation of the affected private sector interests is because there is no political need for them to do so. Perhaps this results from greater political power in the national governments vis á vis the public, possibly attributable to greater confidence in the national government in smaller countries and to tolerance of more centralized government and law than in the United States. Perhaps there exists in other countries an acceptance of the national Government and its officials as the guardians of fairness and the law, and as the institution that is to weigh and balance various and competing interests without needing to hear or heed them.

The most basic reason for the difference may simply be that many countries have a parliamentary form of government without the separation of the legislative and executive branches of government that exists in the United States.

In those countries there may be little likelihood that a convention, once submitted to parliament by the Government, will not receive the requisite approval. Thus, there is not a compelling political need to ensure that industry approves the convention. That is most decidedly not the case in the United States. In the United States, multilateral private law conventions are vulnerable and prone to derailment during the Congressional approval process unless they have the active support of all major stakeholders. Unless the convention meets their often competing needs, the U.S. will not be able to become a party, no matter how strong the Executive Branch's support of the convention may be. This may result in the compromises and complicated drafting that Professor Tetley and others dislike. But the alternative is an elegantly drafted, smooth-flowing, completely coherent convention that sits on the shelf because it is not widely accepted.

This leads to the second and related characteristic of the U.S. approach to private international law negotiations: pragmatism. The result of our highly participatory process is that we tend to take extremely pragmatic positions. We start by focusing on real problems and looking for practical solutions. The active participation of our stakeholders provides a much-needed reality check to

what otherwise is often the largely theoretical work of the organizations responsible for drafting private international law conventions. We do not think that government knows best how to define and solve industry's problems. We are not particularly concerned if these solutions go against the traditional legal theories that have been applied to a particular issue in the past. We understand the need to make compromises in order to have a balanced convention that meets the competing demands of various industry sectors. When our industry representatives tell us that a complicated solution is necessary because the issues are, in fact, complex, we often defer to them.

* * * *

Everyone agrees that none of the existing carriage of goods regimes meet today's commercial needs. These include the 1924 Hague Rules (in use by the United States and a few other countries), the 1968 Hague-Visby Rules (in use by most of our major trading partners) and the 1992 Hamburg Rules (rejected by most major maritime and commercial powers). Most significantly, the Hague Rules and the Carriage of Goods by Sea Act (COGSA) (the U.S. enactment of the Hague Rules), with their tackle-to-tackle scope limitation, and $500 per package liability limitation, fail to address the astonishing changes brought about by containerization, multimodal transport and e-commerce. The U.S. Maritime Law Association ["MLA"] proposed detailed amendments to COGSA in the late 1990's. These amendments were supported by some but not all of the affected U.S. industry groups. Congress was unwilling to legislate in this complex and technical area in the absence of a consensus among all the major affected interest groups.

Although the MLA proposal was not enacted, it nonetheless was an important step in cargo liability reform for at least two reasons. First, one of the lessons learned was that while no party has the power to get its favorite proposals enacted, any major party has the power to block enactment of any other proposal. Thus, everyone realized that cargo liability reform in the United States would not be possible without compromise and cooperation among the major U.S. players. Recognizing this, in 2001 the World

Shipping Council (WSC), representing owners of liner vessels, primarily foreign, that serve the United States, and the National Industrial Transportation League (NIT League), representing U.S. shippers, reached a compromise agreement on cargo liability reform. And second, the MLA proposal to amend COGSA got the attention of the international maritime community. The unwelcome suggestion that the United States might unilaterally reform its cargo liability laws helped convince our trading partners that the time was right for the negotiation of a new multilateral convention.

* * * *

D. Significant Provisions of the Draft Convention

One of the most important features of the draft convention is the range of issues it covers. COGSA, the Hague, Hague-Visby and Hamburg Rules all are limited mainly to liability issues. This convention covers a much broader range of issues. In addition to the ones we will discuss today (scope, liability of the carrier and shipper, liability limits, jurisdiction and freedom of contract) the convention also covers electronic transactions, transport documents, transfer of rights and right of control and delivery to the consignee. Many of these issues have never before been codified in an international convention.

As I highlight some of the main issues in the convention, I would remind you of one caveat: No part of the draft text will be final until it is all final. Thus, when I say that the Working Group has tentatively agreed to particular language, it is still possible for the debate on that language to be reopened.

1. Scope of Coverage

* * * *

From the beginning of this project, there has been no disagreement in substance as to what types of transactions should be within the scope of the convention. Everyone has agreed that, generally speaking, the instrument is intended to cover contracts in the liner trade because they are less likely to be negotiated individually and because a certain inequality of bargaining power between the shipper and the carrier has been assumed. Likewise, everyone has agreed that the instrument should generally speaking not cover the

tramp trade, where individually negotiated charter parties and an equality of bargaining power are normal. It was also agreed that there were some exceptions to this general rule. There was considerable disagreement as to how to reduce this substantive consensus into treaty language.

Three different approaches were identified for defining the scope of application. These came to be called the "documentary" approach, under which the application of the Convention would turn on the issuance of a particular type of document, the "contractual" approach, under which application would depend on the parties' concluding a particular type of contract, without regard to whether a particular document was issued, and the "trade" approach, in which application of the convention would turn on the of trade in which the carrier was engaged. . . .

The Working Group has tentatively agreed on a modern, hybrid proposal that takes advantage of the strengths of each of the three approaches, while minimizing the weaknesses. This proposal starts with a contractual approach, by stating the convention applies to all contracts of carriage by sea that meet certain geographic conditions. Because this approach, standing alone, is too broad and would sweep in contracts that all agree should not be subject to the convention, the proposal then uses a trade approach to exclude charter party contracts and other non-liner contracts. Unfortunately, excluding all non-liner contracts goes too far and would also exclude some transactions that the Working Group agreed should be included. Such contracts technically do not meet the definition of contracts in the liner service; however, they essentially operate as if they were in the liner service and issue traditional liner service bills of lading. Therefore, the policy justification for subjecting them to the convention's mandatory rules applies to them just as strongly as in the strict liner context. This problem is addressed by adding a provision based on the documentary approach that would bring back into the convention's coverage contracts of carriage in the non-liner service where a traditional liner-service-type bill of lading has been issued. This innovative approach is a practical solution to a frustrating problem that has plagued previous carriage of goods conventions.

* * * *

5. Jurisdiction

Prior to the Supreme Court's 1995 *Sky Reefer* decision, U.S. courts uniformly held that COGSA prohibited foreign forum selection clauses. This was an exception to the general rule established by the Supreme Court in the 1972 *Bremen* case that forum selection clauses were presumptively valid. In *Sky Reefer*, the Supreme Court found that COGSA did not prohibit forum selection clauses and that therefore contracts for the carriage of goods by sea were subject to the same rule of presumptive enforceability as other contracts. U.S. cargo interests believe that enforcing foreign forum selection clauses against them is unfair, as these clauses are, they say, part of adhesion contracts and often are hidden in the boiler plate on the back of the bill of lading. The added cost of litigating in a foreign country often forces them to agree to low settlements. As a result, U.S. cargo interests have made reversing *Sky Reefer* one of their primary objectives in the UNCITRAL negotiation.

As part of an overall "package deal," U.S. shipper and carrier interests agreed to a two-part proposal that would provide that, as a general rule, the shipper/plaintiff could choose the place of litigation, even if another forum was designated in the contract between the shipper and the carrier; except that, in situations where there was a negotiated contract between sophisticated parties, the forum selection clause was enforceable and the plaintiff could only litigate in the designated forum. For the United States, a forum selection provision that incorporates these two points—one favoring the shipper, and one the carrier—is a "deal-breaker" issue. It is unlikely that we could become a party to the new convention if it does not include these two rules.

In UNCITRAL, it was clear from the beginning that delegations had irreconcilably different views. Many preferred that forum selection clauses be enforced in all cases, even if they appeared in the boilerplate clauses of a liner bill of lading. Others preferred that exclusive choice of forum clauses never be enforced, thus guaranteeing that cargo interests would have access to convenient forums to resolve their claims against carriers.

The 25 members of the European Union were representative of the larger Working Group, in that they had widely differing views on the forum selection issue. However, the European Commission has

exclusive competency to negotiate jurisdiction questions on behalf of the member states, and thus the individual delegations from EU states were not allowed speak on this issue in the Working Group. Thus the Commission, like the United States, needed to find a compromise position during its coordination sessions with its members.

The text that the Working Group eventually accepted in principle was the result of a joint proposal of the United States and the European Commission. The Commission, which has its own forum selection rules (Brussels I) that generally enforce choice of forum clauses in EU member states, needed to ensure that the EU rules would continue to apply in EU states. At the same time, the Commission frankly acknowledged that this issue was a critical one for the United States, and that the convention was unlikely to succeed without the United States as a party. The Joint Proposal was a compromise that harmonized the law to the extent possible, but offered optional choices to the extent necessary to reach an agreement.

The Joint Proposal is similar in many ways to the U.S. proposal. It permits a plaintiff suing a carrier to institute an action in any of six places with a reasonable connection to the dispute: the carrier's domicile, the place of receipt, the place of delivery, the port of loading, the port of discharge, or a place designated in a forum selection clause. It also provides that, notwithstanding this general default rule, exclusive choice of court clauses in certain volume contracts would be enforceable between the parties. This exception for a defined class of volume contracts meets the U.S. insistence that forum selection clauses in mutually negotiated contracts between sophisticated parties should be upheld.

But the Joint Proposal also meets the European Commission's need, and that of other countries whose internal laws generally uphold choice of forum clauses. It does this by permitting any Contracting State to give effect to any choice of court agreement if that State gives notice that it will do so when it becomes a party to the convention. EU members and some other states will presumably take advantage of this option. The effect of this for the United States is that, assuming the United States abides by the general default rule and does not give notice that it will enforce choice of court clauses in circumstances other than those specified in the

convention, U.S. cargo and carrier interests will be met: the cargo interests will have succeeded in partially overruling the *Sky Reefer* case, thereby giving the U.S. cargo plaintiff the right to litigate in the United States in many cases; and the carrier interests will have preserved the right to enforce forum selection clauses in certain volume contract cases.

* * * *

E. Next Steps

This negotiation has already taken longer than most countries, including the United States, would have liked. But, it is a massive undertaking, covering numerous topics that could easily have been the subject of half a dozen separate conventions. And I am encouraged that we are making good progress on all of those topics. I think that it is realistic to expect that the Working Group will finish the text of the convention in 2007. The draft convention then must be approved by the full Commission, and finally by the U.N. General Assembly, at which point it will be open for signature, hopefully in 2007, or, at the latest 2008.

(2) U.S. submissions

(i) Seventeenth session of Working Group III

In preparation for the seventeenth session of Working Group III (Transport Law), in New York, April 3-13, 2006, the United States provided two submissions in advance, one on Chapter 8 of the draft convention (Shipper's obligations) and the other on Chapter 9 (Transport documents and electronic transport records). U.N. Doc. A/CN.9/WG.III/WP.69 and A/CN.9/WG.III/WP.62, respectively; both documents are available at *http://documents.un.org* and at *www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html*. As indicated in the cover note by the Secretariat in circulating the U.S. submission on Chapter 9, it "was intended to facilitate consideration of the topic of transport documents and electronic transport records in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group."

The U.S. submission on Chapter 8 responded to proposals in a submission by Sweden and set forth the U.S. position on the treatment of delay. The explanatory section of the U.S. statement on delay and proposed draft article 31 are set forth below; the proposal included additional conforming changes.

---

* * * *

8. The United States strongly believes that consequential damages for delay should be excluded from the draft convention for both shippers and carriers. Including delay in the draft convention for shippers potentially creates enormous, open-ended liability exposure for shippers. Deletion of delay from the draft convention is also supported by the difficulties surrounding the establishment of a reasonable and logical liability limit that could be applied to shipper delay damages, as well as establishing a liability regime that allows for insurability of the potential risks associated with delay damages. In order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree. Just as holding shippers liable to carriers under the draft convention for delay exposes them to significant potential liabilities, so too does holding carriers liable to shippers for delay. Carriers could be exposed to claims for damages in connection with delays that are beyond the control of the carrier (e.g., delay in obtaining a berth due to port congestion, inability to release cargo due to terminal congestion, late delivery due to a shortage of truckers or a shortage of rail equipment). Subjecting carriers to liability for delay damages invites a significant increase in claims and related litigation, thereby increasing not only the time and expense of defending and/or settling the claims, but also higher insurance costs which will surely follow from the increased risk and unknown level of claims. The potential economic impact on the industry is such that the inclusion of carrier liability for delay in the draft convention could discourage carriers in some trades from offering door-to-door intermodal services in order to avoid such claims. We believe that the issue of delay and the consequential damages that typically

result from such an event are more appropriately addressed by the commercial parties on a case-by-case basis.

9. Should the Working Group decide to retain carrier liability for consequential damages for delay in the draft convention, the U.S. delegation is of the view that, in order to maintain a fair balance, it is essential to include a mirror liability for a shipper who causes carrier delay and exposes a carrier to losses resulting from delay claims against it by other shippers. Because carrier liability for delay damages would be capped, such shipper liability should also be subject to a reasonable limitation.

10. The U.S. delegation has spent considerable time trying to develop an acceptable limitation on shipper liability for delay damages and found it to be an extremely difficult task. A limitation based on the freight paid by the offending shipper is thought by carrier interests to be unreasonably low, while shipper interests find other formulations unreasonably high. A carrier should be fairly protected against any losses it incurs for delay damages caused by a shipper, albeit that the resultant liability on one shipper could be significant. We have therefore concluded that the only equitable resolution to this dilemma is to remove the concept of delay damages from the draft convention for shippers and, unless they agree in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well.

11. Finally, with respect to whether the shipper's liability should be subject to a fault-based regime or a strict liability regime, the United States believes that a breach of the shipper's obligations under draft articles 28 and 30 (a) should be subject to a fault-based standard, whereas a failure to provide accurate information should be subject to strict liability. We are uncertain as to whether a shipper should be held strictly liable for a failure to provide information required by draft article 30 (b). On the one hand, a fault-based standard might be appropriate because strict liability would create a significant departure from existing maritime law, and it could be unfair to hold the shipper strictly liable for failure to provide information when the failure was not its fault. On the other hand, strict liability might be appropriate for a breach of article 30 (b) because carriers are dependent on shipper-provided information to comply with legal requirements, and non-compliance may result in liability for the carrier.

12. Therefore, the United States urges the Working Group to consider the following proposal for draft article 31:

> *Article 31. Basis of shipper liability*
> *1. The shipper is liable to the carrier under the contract of carriage and to any maritime performing party for loss or damage* caused by the goods and for breach of its obligations under article 28 and paragraph[s] 30 (a) [and (b)], provided such loss or damage was caused by the fault of the shipper or of any person referred to in article 35.*
> *2. Notwithstanding paragraph 1, the shipper is deemed to have guaranteed the accuracy [and timeliness] at the time of receipt by the carrier of the information and documents that have to be provided according to paragraph[s] 30 [(b)] and (c). The shipper must indemnify the carrier against all loss or damage* arising or resulting from such information, instructions and documents not being accurate [or provided on a timely basis].*
>
> * * * *

(ii) Eighteenth session of Working Group III

In preparation for the eighteenth session of the working group, held in Vienna from November 6-17, the United States submitted a proposal concerning the procedure for the amendment of the limitation amounts in the draft convention. U.N. Doc. A/CN.9/WG.III/WP.77, available at *http://documents.un.org* and at *www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html*. Excerpts follow.

---

* U.S. agreement to the removal of shipper's liability for damages caused by delay from the draft wording of articles 31 and 33 is expressly conditioned upon the elimination of the mandatory carrier liability for consequential damages for delay under article 22 of A/CN.9/WG.III/WP.56. The U.S. views carrier liability for consequential damages for delay as directly related to the issue of shipper liability for delay. If the Working Group decides not to eliminate such carrier liability, the U.S. position is that shipper liability for delay must be reinserted, subject to a reasonable limitation.

General comment

1. As discussed in A/CN.9/WG.III/WP.34, the United States supports an expedited procedure to amend limits which avoids the full panoply of formalities normally required to amend the draft Convention. At the same time, the United States is of the view that it is important to ensure that such amendments to liability limits reflect a broad consensus on the need for a change and that the procedure ensures a stable, predictable commercial environment regarding risk management arrangements. Unless otherwise indicated, the following comments relate to draft article 104 of A/CN.9/WG.III/WP.56.

Draft paragraph 2

2. Initiating a change to the liability limits should require the support of at least half of the parties to the draft Convention. The number of parties does not necessarily correlate to the percentage of cargo volume or cargo value covered by the draft convention, nor of a country's number of transport providers. A requirement of only one quarter of the parties would permit the initiation of the process to change a material term of a formal treaty without insuring that there is a consensus on the need for change, particularly amongst those most affected. Requiring the support of half of the parties does not tie the change to a cargo volume or value requirement, but it does insure that the need for change will be a widely held view. We believe that review of limits agreed in a formal treaty should not be undertaken absent such a widely held view. Several comparable treaties require the support of at least half of the parties to initiate an amendment. In addition to the 2002 Protocol to the Athens Convention, the 1990 Protocol to the Athens Convention, the Convention for Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, and the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims adopt such a procedure.

3. Under existing practices in international private law, significant changes to concluded texts are usually produced by the same multilateral bodies that formulated the original text, acting through their general membership (and, in the case of UNCITRAL,

observer States), and not only Contracting States to a particular treaty (although States party can also always agree to amendments as between themselves, or inter se). UNCITRAL, for example, amended its first convention (the 1974 Convention on the Limitation Period in the International Sale of Goods) not by action of the Contracting States but by the Commission elaborating a 1980 amending Protocol to the Convention.

Draft paragraph 4

4. Similarly, strict voting procedures tend to politicize issues, and are not in line with the Commission's consistent practice of making decisions by consensus, which is a more appropriate method for the formulation of uniform rules on private law matters. Given that the initial limitation adopted in draft article 64 will have been adopted by consensus, any amendment should be adopted in the same manner. Any amendment adopted by the Commission should, following the normal practice, be referred to the General Assembly for approval upon the recommendation of the Commission.

* * * *

b. Carriage of Goods by Sea Act

In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), the U.S. Supreme Court held, among other things, that (1) general federal maritime law, rather than state law, governed a cargo claimant's recovery action against a railroad that had damaged a shipment during the inland portion of a multimodal international shipment under a through bill of lading; and (2) the general federal maritime law permitted the inland extension of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 note (the U.S. legal regime that generally governs ocean carriers in international trade). The possible application of the Carmack Amendment (the U.S. legal regime that covers inland carriage under certain circumstances) had not been raised by the parties and thus was not before the Court in *Kirby*. *See Digest 2004* at 830-34.

In 2006 two U.S. federal courts of appeal considered whether COGSA or the Carmack Amendment was applicable to claims arising from losses during the U.S. inland portion of a shipment carried initially by sea on multimodal bills of lading (where no separate bill of lading had been issued for the inland carriage) and reached divergent conclusions as to the liability of the inland freight carrier.

In *Altadis USA, Inc. v. Sea Star Line*, 458 F.3d 1288 (11th Cir. 2006), the U.S. Court of Appeals for the Eleventh Circuit held that a one-year statute of limitations for bringing claims, consistent with COGSA, applied to a claim for cigars stolen during the U.S. inland transportation segment of a shipment originating in Puerto Rico covered by a multimodal bill of lading. In so holding, the court rejected Altadis' argument that the Carmack Amendment to the Interstate Commerce Act of 1887, Act of June 29, 1906, ch. 3591, 34 Stat. 584 (1906) (49 U.S.C. § 11706) "which states that a carrier cannot provide, by rule or contract, for a statute of limitations of less than two years for bringing a civil action," should apply to the land portion of the bill of lading for transportation within the United States. Excerpts below provide the court's analysis.

---

* * * *

The question with which we are faced is straightforward: where a single bill of lading covers a shipment from Puerto Rico to Tampa (including the ocean leg to Jacksonville and the overland leg from Jacksonville to Tampa), does the Carmack Amendment and its two-year minimum statute of limitations apply to a loss occurring on the overland leg, or does the one-year statute of limitations provided for in the bill of lading and COGSA apply?

The case law has established that the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and overland leg to the final destination in the United States) unless the domestic, overland leg is covered by a separate bill of lading. . . . *American Road Service Co. v. Consolidated Rail*, 348 F.3d 565, 568 (6th Cir. 2003) . . . *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir. 1993), . . .

Capitol Converting Equipment v. LEP Transport, 965 F.2d 391, 394 (7th Cir. 1992) . . . [9] Dicta in our own circuit is consistent with the Fourth, Sixth and Seventh Circuits. [*See*] *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986). . . .

The notion that a separate, inland bill of lading is a prerequisite to the application of the Carmack Amendment originated from a discussion in an earlier case before the Supreme Court. In *Reider v. Thompson*, 339 U.S. 113, 70 S. Ct. 499, 94 L. Ed. 698 (1950), a shipment of goods originating in Buenos Aires was sent over water to New Orleans. In New Orleans, a new and separate bill of lading was issued pursuant to which the goods were carried to Boston, where they arrived in damaged condition. The plaintiff sued, claiming the Carmack Amendment applied, and the Supreme Court accepted the plaintiff's argument. *Reider*, 399 U.S. at 118-19, 70 S. Ct. at 502-03. The Court explained:

> The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated. Thus it is not significant that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States. The obligation as receiving carrier originated when respondent issued its original through bill of lading at New Orleans. That contract of carriage was squarely within the provisions of the statute. *Id*. at 117, 70 S. Ct. at 502 (citations omitted).

* * * *

. . . Contrary to Altadis' argument, the cases do in fact require a separate bill of lading.[12]

---

[9] Only the Ninth Circuit has reached a different result. *See Neptune Orient Lines v. Burlington N. and Santa Fe*, 213 F.3d 1118, 1119 (9th Cir. 2000).

* * * *

[12] Although it is true that Puerto Rico is a possession of the United States, that fact does not serve to distinguish the cited cases involving shipments from foreign ports. The language which Altadis suggests supports the applicability of the Carmack Amendment to shipments to the United States

We also believe that Altadis' position is in tension with the opinion of the Supreme Court in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004). The case was "a maritime case about a train wreck." *Id*. at 18, 125 S. Ct. at 390. There was a shipment of machinery from Australia to Huntsville, Alabama, pursuant to a through bill of lading. *Id*. at 19, 125 S. Ct. at 390. The Court held that the bill of lading was a maritime contract, holding: "so long as a bill of lading requires a substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract." *Id*. at 27, 125 S. Ct. at 395. The Court emphasized the importance of the uniformity of the general maritime law, and accordingly the need to reinforce the liability regime Congress established in COGSA, and the apparent purpose of COGSA to facilitate efficient contracting in contracts for carriage by sea. *Id*. at 28-29, 125 S. Ct. at 395-96. The Court also noted that a "single Himalaya Clause can cover both sea and land carriers downstream."[13] *Id*. at 29, 125 S. Ct. at 396. Finally, the Court pointed out that COGSA explicitly authorizes such clauses. *Id* (citing 46 U.S.C. § 1307). Thus, the Court held that Norfolk Southern, the rail carrier having custody of the machinery at the time of its damage, was entitled to the protection of the liability limitations in the through bill of lading.

Altadis' position in this case is in tension with *Norfolk Southern* in that it would introduce uncertainty and lack of uniformity into the process of contracting for carriage by sea, upsetting contractual expectations expressed in through bills of lading. Given the holding [in] *Norfolk Southern*, which recognizes that a rail carrier on the inland leg of a maritime contract is protected by the limitations in a through bill of lading, Altadis' position would introduce a different result if the inland carrier were a motor carrier.

---

from United States possessions - 49 U.S.C. § 13501(1)(C) - is identical to the language relating to shipments from foreign countries to the United States - 49 U.S.C. § 13501(1)(D).

[13] A Himalaya Clause operates to extend the contractual limitations on liability beyond the initial contracting carrier (e.g., the ocean carrier) to include also downstream carriers (e.g., the land carrier, Norfolk Southern in the Supreme Court case). The bill of lading in this case also includes such a clause.

The purpose of COGSA to "facilitate efficient contracting in contracts for carriage by sea" would be undermined. *Norfolk Southern*, 543 U.S. at 29, 125 S. Ct. at 396.

* * * *

Conversely, the U.S. Court of Appeals for the Second Circuit held that the Carmack Amendment rather than COGSA controlled in a case concerning a shipment from Japan to Georgia on a multimodal bill of lading (where no separate bill of lading had been issued for the inland carriage) for damage during the U.S. inland portion of the shipment from California to Georgia by rail. *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006). In *Sompo* the issue concerned limits on liability; Union Pacific claimed that COGSA controlled, thus limiting liability to $500 per package, while the Carmack Amendment potentially imposes full liability. Excerpts below from the Second Circuit opinion explain its conclusion that, in this case of first impression for the circuit:

> Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country, like the one at issue here. While the through bills attempt to extend COGSA's sweep inland, that contractual extension lacks the force of statute. And in our view, the intermodal through bills, written in the context of COGSA, fall[] short of the Staggers* prerequisite for limiting a rail carrier's Carmack liability.

The court vacated a district court opinion to the contrary and remanded for further proceedings.

---

* * * *

Carmack applies to common carriers "providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board." 49 U.S.C. § 11706(a). The Board's jurisdiction over rail

* Editor's note: The court's analysis in finding inapplicable the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. § 11706, has been omitted from the excerpts here.

15-Cummins-Chap15.indd 922 10/22/07 11:47:21 PM

carriers applies to "transportation in the United States between a place in . . . the United States and a place in a foreign country." 49 U.S.C. § 11706(c)(1), (c)(3)(A).

* * * *

Most courts that have answered this question [of the applicability of Carmack to domestic rail transport that is part of a larger transportation originating in a foreign country] tend to reiterate the Eleventh Circuit's articulation of its holding in *Swift Textiles v. Watkins Lines, Inc*. [799 F.2d 697 (11th Cir. 1986)] that "when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge," *Swift*, 799 F.2d at 701, as is the case with a through bill of lading, then Carmack applies only if there is a separate bill of lading covering the inland portion of the shipment. . . . We agree with *Swift*'s mode of analysis but think that the court's articulated holding is fatally flawed.

* * * *

For the court in *Swift*, there was no question that Carmack applied to the domestic leg of a shipment that began in a foreign country. Indeed, the court referred in the opinion to § 10521(a)(1)(E) as "the continuation of foreign commerce provision." *Swift*, 799 F.2d at 699. . . . The court . . . articulated an "intent test" for determining the nature of an intermodal shipment: "[t]he nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by 'the essential character of the commerce,' *United States v. Erie R.R. Co*., 280 U.S. 98, 102, 50 S.Ct. 51, 74 L.Ed. 187 (1929), reflected by the 'intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement,' *Great N. Ry. Co. v. Thompson,* 222 F.Supp. 573, 582 (D.N.D.1963) (three-judge district court)." *Swift*, 799 F.2d at 699.

Applying this intent test, the court determined that the shipment represented a "continuation of foreign commerce" and therefore Carmack applied. . . . Having adopted a view of the shipment as a single continuous transport, the court considered it irrelevant that the motor carrier had issued a separate bill of lading for the final intrastate leg of the journey. Quoting the Supreme Court in

Erie Railroad, the *Swift* court explained that the character of the shipment is "not affected by the fact that the transaction is . . . completed under a local bill of lading which is wholly intrastate. . . ." *Id*. at 700 (quoting *Erie R.R.*, 280 U.S. at 102, 50 S.Ct. 51).

Despite the clarity of *Swift*'s analysis, the court muddied the waters when it articulated its holding:

> [W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.

Id. at 701 (emphasis added). The court's statement that a domestic bill of lading is necessary for Carmack to apply is perplexing to say the least. Indeed, it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack did not apply. Once the *Swift* court had determined that the parties intended a continuous shipment from the foreign place of origin to the final destination, it deemed the separate domestic bill of lading to be irrelevant. Further, the version of Carmack in force at the time of *Swift* explicitly provided that a motor (or rail) carrier's failure to issue a bill of lading did not remove the carrier from Carmack's reach, *see* 92 Stat. at 1359, 1361, 1453, and that provision still exists as to rail carriers, *see* 49 U.S.C. § 11706(a).

* * * *

. . . [A]lthough we reject *Swift*'s articulated holding, we have no hesitation about adopting Swift's mode of analysis for determining Carmack's applicability. . . .

* * * *

. . . As pertinent to this case, Carmack applies to "transportation in the United States between a place in . . . the United States and a place in a foreign country." 49 U.S.C. § 10501(a)(2)(F). . . .

* * * *

. . . [W]e do [not] think that the Supreme Court's later decision in *Reider v. Thompson,* 339 U.S. 113, 70 S.Ct. 499, 94 L.Ed. 698 (1950), resolved the issue at hand, as the Seventh Circuit has suggested. . . . The issue in *Reider* was whether Carmack applied to the inland rail carriage of a shipment of goods that originated in Buenos Aires, Argentina with the final destination of Boston, by way of New Orleans, Louisiana. Importantly, the original carrier in *Reider* did not issue a through bill of lading from Buenos Aires to Boston. 339 U.S. at 117, 70 S.Ct. 499. Accordingly, the Supreme Court viewed the shipment as consisting of two distinct legs: Buenos Aires to New Orleans and New Orleans to Boston, and the Court rightly pointed out that Carmack clearly applies to the interstate leg from New Orleans to Boston. *Id.* . . . [T]he *Reider* Court specifically reserved from its judgment the question at issue here: whether Carmack applies to the domestic rail portion of a single, continuous shipment of goods originating in a foreign country.

* * * *

Our interpretation of Carmack--that it applies to the domestic inland portion of a foreign shipment regardless of the shipment's point of origin--also comports with Congress's view of the law when Congress codified the ICA in 1978. . . .

* * * *

Because the period of responsibility and Himalaya clauses in [the] through bills of lading together extend COGSA's terms to subcontractors, like Union Pacific, the fact that Carmack also applies to the Union Pacific leg of the . . . shipment creates a potential conflict between two different liability regimes. In our view, however, the conflict is not between two federal laws but rather between one federal law (Carmack) and a contract that, although incorporating the terms of another statute (COGSA), nevertheless lacks statute-like status. Section 1307 of COGSA states:

> Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and

> handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

46 U.S.C. app. § 1307. Because COGSA only applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," *id.* § 1301(e), courts have consistently held that when COGSA is extended by contract beyond the tackles, as contemplated by § 1307, the statute does not apply of its own force, or *ex proprio vigore,* but rather as a contractual term. . . .

This view of COGSA finds further support in the fact that . . . Congress created in COGSA what has become known as the "coastwise option," which authorizes carriers and shippers in domestic trade to, in effect, contractually opt . . . into the COGSA regime, as long as they do so with an "express statement." 46 U.S.C. app. § 1312. . . .

* * * *

Consistent with the treaty's intent, Congress specifically provided in COGSA that the statute would have no effect upon laws applying to the inland carriage of goods:

> Nothing in [COGSA] shall be construed as superseding any part of [the Harter Act], or of any other law which would be applicable in the absence of [COGSA], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

46 U.S.C. app. § 1311. . . .

Union Pacific would have us rely upon the Supreme Court's recent decision in *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004), but *Kirby* does not alter our analysis. In *Kirby,* the Supreme Court held that federal law should govern the interpretation of a through bill of lading consisting of sea and land portions, as long as the sea portions are "substantial." *Id.* at 27, 125 S.Ct. 385. . . .

The Supreme Court found that the bill of lading, although covering carriage by both sea and land, was nevertheless a maritime contract to which federal law applied. *See id.* at 23-27, 125 S.Ct. 385. . . . The Court further explained that in applying federal law, it was avoiding the "[c]onfusion and inefficiency [that] will inevitably result if more than one body of law governs a given contract's meaning," *id.* at 29, 125 S.Ct. 385, and thereby was promoting "the uniformity of general maritime law," *id.* at 28, 125 S.Ct. 385. The Court noted that in applying a single body of law to the contract, it was also "reinforc[ing] the liability regime Congress established in COGSA." *Id.* at 29, 125 S.Ct. 385.

Union Pacific contends that the same concern for uniformity and consistency in interpreting international maritime contracts "demands that provisions of 'through bills of lading' which extend limitations of liability to inland carriers should be analyzed under COGSA and not the Carmack Amendment." We cannot read *Kirby* so broadly. In *Kirby,* the Court was primarily concerned with the lack of uniformity and consistency that would result if *state* law were applied to contracts extending COGSA's terms inland. That is a significant concern, especially for the myriad parties potentially responsible for an inland carrier's damage to goods who cannot know before the fact which state law might define the contours of their liability. The Supreme Court's decision that national law will govern the interpretation of an international bill of lading with a substantial sea component adroitly avoids that problem.

However, in *Kirby,* the cargo owner failed to raise the issue of Carmack's applicability. *See* Brief for the United States as *Amicus Curiae* at 12, *Norfolk So. Ry. Co. v. Kirby,* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) (No. 02-1028), 2003 WL 22762727. Therefore the only issue before the Court was the interaction between *state* law and contractual provisions extending COGSA's terms to a rail carrier. Consequently, *Kirby* only established the principle that maritime contracts should be interpreted in light of federal maritime law. Notwithstanding Union Pacific's argument to the contrary, it does not follow from that principle that the only federal law to apply is COGSA. Nor can we

accept the argument that Carmack—what Union Pacific refers to as a "non-maritime federal law"—cannot play a role in governing the terms of the domestic carriage portion of a maritime contract. Federal maritime law consists of both federal common law and federal statutes. Although federal common law plays a more prominent role in the maritime context than in others, where it remains largely interstitial, it nevertheless only applies in the absence of a relevant statute. *See, e.g., E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) ("Absent a relevant statute, the general maritime law, as developed by the judiciary, applies."). What constitutes a relevant federal statute is determined solely by whether a given statute applies by its own terms to a particular set of facts. There is no additional requirement that only those federal statutes that a court deems "inherently maritime" can govern the interpretation of a maritime contract.

To apply COGSA here to the exclusion of Carmack would be to contradict well-established circuit precedent holding that period of responsibility provisions do not have statute-like status and would undermine the text of the statute itself, which explicitly states that COGSA does not affect laws governing the carriage of goods prior to loading and after discharge. 49 U.S.C. app. § 1311. (fn. omitted). We cannot interpret the *Kirby* Court's language concerning the policy underlying COGSA—language that at most merely supported, but was far from central, to the Court's holding that federal law should apply instead of *state* law—as implying that a contract extending COGSA inland should supersede an otherwise applicable *federal* law. Without further guidance from the Supreme Court or from Congress, we must rely on precedent and the plain language of the statutory scheme.

* * * *

2. Commercial Law Initiatives Relevant to Development Policies

In a memorandum dated December 1, 2006, for the U.S. Agency for International Development, Harold S. Burman, Office of the Legal Adviser, Private International Law, provided an overview of 2006 commercial law initiatives of particular relevance

to development policies. Mr. Burman's memorandum noted that it did not cover "related areas of PIL activity such as commercial arbitration, the Hague choice of court convention or progress on revisions to the Hague apostille convention." The memorandum, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

As a general matter, our international commercial law projects of significance for developing and emerging states have been focused this year on three areas of commercial law, secured finance, electronic commerce, and cross-border business bankruptcy law. While considerable activity has also taken place with respect to investment securities and related market structure issues, those, while very important for a medium or long-term point of view for enhancing the economies of such states, are of somewhat less immediate significance, since implementing them would need to be accompanied by other developments in their market structures.

One change has become apparent during 2006. As a result of the considerable advances in international private commercial law (IPCL), these fields of law and the economic goals they seek to achieve are beginning to intersect more often, and increasingly present difficult policy choices about overlapping and sometimes inconsistent means to achieve economic enhancement in the developing world. . . .

A case in point is the very considerable advances made on promoting modern secured finance law reform in the third world. Adopting modern commercial finance concepts, in many cases already market-tested in countries such as the US, is a leading path by which economic development and capacity-building in the third world can be accomplished. A close second is the necessarily related area of business bankruptcy law reform, increasingly seen by international capital markets as a front-line test of economic law progress in developing countries.

Modern secured finance law can significantly expand the range of assets available as collateral for domestic and trade credit,

expand the range of persons and entities that have access to that credit, especially small and medium size entities, and lower the cost of credit overall. This is most often accomplished by requiring transparency for other financing parties through filing systems and keying priorities of lenders to that, with only very limited exceptions. The UNCITRAL Convention on assignments, the draft UNCITRAL legislator's guide on secured finance, the UNIDROIT Cape Town Convention, and the OAS Model Inter-American law on secured finance all adopt that approach.

Securing other and sometimes short-term advances however can result in conflicting paths which need to be rationalized. UNIDROIT for example, supported by the IFC as well as a number of equipment leasing associations, including those in the US, is moving toward a model national law primarily on financial leasing. That draft is aimed at and can facilitate imports of needed infrastructure equipment by less developed countries, an important goal. It would do so however by overcoming the credit deficits of such countries by granting special non-disclosed creditor's priority rights for exporters of such goods into those countries. This would conflict sharply with the overall reform on secured finance sought at UNCITRAL, which, consistent with the views of a large majority of participating countries, seeks to curtail such non-disclosed liens in a priority contest between creditors.

Added to that are the important advances made in the area of cross-border business bankruptcy law, which in order to make possible US-style reorganization and refinancing of failing businesses, a critical factor for developing states, calls for a stay of any actions by secured creditors at least at the outset of any collective proceeding. The work at UNCITRAL on secured finance as well as bankruptcy law reform is being largely conformed to this objective. The World Bank and the IMF have supported the goals of law reform in business bankruptcy set out by UNCITRAL, which are being incorporated in new joint standards of the Bank and IMF for assessing recipient country progress.

The UNIDROIT draft model law on leasing would be inconsistent with this. Similarly, recent proposals for principles of secured finance reform for the Inter-American system would avoid the bankruptcy reform referred to above so as to encourage an

inflow of short-term secured finance. These inconsistencies have been justified by the goal of achieving the earliest possible introduction of needed equipment or finance into LDC's (least developed countries) and others.

We will also have to now assess the impact on these differences on the growing number of developing countries that are becoming parties to the Cape Town Convention and its Protocol on aircraft finance, as well as the soon to be completed second Protocol on railway finance. That treaty system is also dependent on transparent and publicly-accessible financing information through registries as a means of establishing priorities.

These conflicting approaches result from the very success that has been achieved in the PIL field, but which now need to be more closely assessed as to the legal means employed and the conflicting short and longer term goals involved. . . .

* * * *

3. UNIDROIT Mobile Equipment Convention: Draft Space Assets Protocol

The International Institute for the Unification of Private Law ("UNIDROIT") Mobile Equipment Convention ("Cape Town Convention") and its Aircraft Protocol entered into force on March 1, 2006. The United States ratified the convention in 2004. On October 29, 2006, Mr. Burman provided a summary of U.S. views on the draft space assets protocol to the convention in a memorandum for the UNIDROIT Space Assets Working Group. Mr. Burman's memorandum, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm; see also Digest 2005* at 802-05.

In response to questions about the policies underlying certain of our positions at the London meeting of interested states and industry representatives, we are providing the following information. It should be noted that, given changing developments in this new field both as to technology and policy, the views herein expressed

will be reevaluated and may be amended when intergovernmental negotiations resume.

We have been asked about (a) our views as to the relationship between the draft Unidroit space finance protocol and the 1967 UN Outer Space Treaty (OST) and (b) whether the concepts of financing rights therein are drawn from existing international regimes such as that in place for commercial airspace.

As to the first, we have proposed, with the support of a number of States, that the draft protocol expressly provide that it does not alter or amend rights and obligations of states parties to the OST or the treaty undertakings set forth in the organic acts and subsequent instruments of the International Telecommunications Union (ITU). It is our understanding that there is agreement on this point which will be reflected in a subsequent draft. This is consistent with the views expressed at the UN Committee on the Peaceful Uses of Outer Space (COPUOS), where it was generally concluded that there was no apparent conflict between the two, but also agreement that the Protocol should not be a basis on which a state might argue that it was not obligated to adhere to the OST provisions if it were a party to both.

That said, the absence of definitions or agreed interpretations of key OST terms and provisions, plus the diverse practices that have arisen as "national means of implementation" of the OST, creates uncertainty as to the intersection of rights or obligations of states under OST and future transacting parties under the protocol. This has led to the avoidance in the protocol of terms used in the OST so that cross interpretations are not required. It has also supported the approach of the protocol, consistent with the underlying Cape Town Convention, of avoiding concepts of ownership of space assets, leaving the latter to other law. This in turn has raised the issue of the nature of such financing rights and their relationship to otherwise applicable property law regimes, if any (some read the OST as disapplying land-based property laws as an adjunct of the preclusion of state assertions of sovereignty).

The draft protocol instead focuses on financing rights only as between transacting parties and others acting in reliance. The underlying Cape Town Convention on mobile equipment financing provides a framework for the creation of secured financing

rights in equipment, and for priority based on filing in a treaty-based international registry, which will prevail in most cases over otherwise valid domestic-law rights. As applied to aircraft under the first protocol to the Cape Town Convention, in force since March 2006, it already covers over fifty percent of the world's commercial aircraft transactions.

Extending that regime on the same basis to interests in outer space was initially seen as a feasible goal. It was however concluded that the treaty basis of "law" and rights in commercial airspace was not compatible with that of the OST. The 1944 Chicago Convention, the 1948 Geneva Convention on nationality and certain rights in aircraft, and related undertakings are premised on territorial-based rights extended to overhead airspace, which are in turn modified and made subject to the Chicago Convention's collective approach and regulatory regime under ICAO. Since the OST precludes assertions of sovereignty in outer space by states parties, which covers close to 100 states including all "space faring" states, together with endorsement of the principles of the OST by UNGA resolutions, that approach would be likely to be rejected by many. Indeed the US along with almost all states at COPUOS have not supported territorial-based rights in space asserted by some countries over which geostationary satellites are in orbit.

* * * *

The approach of the Cape Town Convention . . . has been seen as achievable, and has been implemented recently for airspace, thus providing a substantial base for support in the aerospace sector. Since it is limited to financing rights of transacting parties, it may be possible . . . to create sufficient commercial rights both to income produced and recovery of assets of defaulting borrowers so as to create potential sources of credit. It should be noted that the final arbiter, should states ratify such a regime, remains the capital markets and market assessment of risk versus the degree of assurances provided by the space protocol.

Other OST state obligations are not expected to affect the drafting of financing rights as between transactional parties. Residual state party responsibility and liability as a launching state or otherwise could attach, for example, to damage caused by a

satellite under OST or the OST Liability Convention (cases of such damage or application of these provisions are rare so there is no basis on which to assess their application). While this is unlikely to affect private financing rights under the protocol per se, it could affect the assessment of residual risk and therefore the credit rating of such transactions. Current regulatory regimes of states parties to the OST make cross-over issues such as this at present unlikely.

It should be noted here that the new space assets registry that would be set up would be completely separate from the OST-based registry managed by the UN staff of the Outer Space Affairs office (OOSA) in Vienna. Non-registration or inaccurate registration of a satellite at OOSA for example should have no effect on potential rights of transacting parties that could be established pursuant to filing in the Cape Town space registry. The space assets registry itself would not establish rights, but would position a claimant if a contest arose to have priority if its interest can be proven and it was first to be filed.

An additional point might be noted. The views expressed by the US in this negotiation and parallel views of many in the space and telecommunications sectors have been premised on analyses of the known risks and economics of the manufacture, launching and operation of satellites and the provision of commercial services in orbital space. No attempt has been made to estimate these factors in terms of any possible future commercial activities on stable bodies beyond earth atmosphere.

* * * *

4. Electronic Commerce

On October 20, 2006, Mr. Burman, who is also the chair of the American Bar Association ("ABA") International E-commerce Working Group, provided a summary report on electronic commerce legal developments in international commerce law for the year 2006 to that date for the ABA Committee on Cyberspace Law.

---

* * * *

Following adoption in 2005 of the Uncitral Convention on Electronic Commerce, 2006 has seen efforts to promote its adoption by the large number of primarily developing countries that do not yet have basic laws on the subject. This has placed on the table of many countries a UN-imprimatur model which comprises "enabling" laws which facilitate, but largely do not regulate, use of electronic messaging in contracts and commerce. This approach is compatible with existing US federal and uniform state law and with the first Uncitral Model law on Electronic Commerce of 1996 (which we see as "Round one"). The competing model, based on European Union Directives, follows a more regulatory approach which in our view can unduly constrain economic development.

It should be noted in this regard that the EC in its participation in the negotiation of the 2005 Convention did not object to its substantive provisions. The EC has however so far taken a negative view of the Convention because of provisions therein relating to "Regional Economic Integration Organizations", aimed at allowing the EU itself to become a party, which the EC believes as worded may undermine the obligation of EU States to adhere to EU *droit communitaire*.

* * * *

"Round two" saw a more regulatory approach as in the second Uncitral Model law which covered electronic signatures and the adoption of regulatory laws compatible with that in some developing countries as well as the EU. . . . The second Uncitral model law, adopted in 2000, in the US view adopted a restrictive technology approach that was too regulatory, as well as requiring infrastructure unneeded for the large majority of e-commerce transactions. Whether the new UN model will replace that model remains to be seen.

This has set the stage for "round three" in electronic commerce. . . .

A number of countries may back at Uncitral further work on cross-border recognition of electronic signatures, deemed useful for those countries that have followed the EU approach. Some US interests are focused on an alternative, which would promote progress in the transferability of interests by computer systems, a long-sought grail of the e-commerce world.

The US private sector approach on transferability has shifted however from the initial focus on achieving technically and through new legal structures "uniqueness" of e-messages, which would assure the safety of rights (and goods) transferred, to a recognition that that goal is not likely to be achievable in wide-spread commercial application. Instead current proposals have returned to concepts of large capacity computer registries which today can, at low cost, hold sufficient transactional information to make that feasible. That would likely need to be accompanied by a treaty, model national law, or sector-based mechanism that would be able to deal effectively with competing third-party rights, in order to induce commercial parties to rely on such transferability.

Related to both these developments are projects of the UNECE's CEFACT organization, a UN ECOSOC body, which is proceeding with work on "single window" projects. This would promote channeling a number of import-export mechanisms, such as import licensing, cargo clearance, insurance, government agency functions etc. into and through a single nationally-authorized portal, as a means of making more efficient and accountable those trade mechanisms in developing countries and thus boosting trade. Others however express concern that such developments could lead in some countries to more government control and less competition, leaving the promise of e-commerce unmet. . . .

5. Securities Held Through Intermediaries

On July 5, 2006, the United States and Japan jointly signed the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary; they were the first states to sign the convention. Although the convention was negotiated in The Hague in November 2002, the official name reflects the date when these first signatures took place, following the practice of The Hague Conference. In the United States the convention, once ratified, will be self-executing. Excerpts below from a letter of September 15, 2006, from Mr. Burman to Joyce Hansen, Deputy General Counsel, Federal Reserve Bank

of New York, explain the decision to sign jointly and the significance of the convention for U.S. interests. The full text of the letter is available at *www.state.gov/s/l/c8183.htm*. The text of the convention is available at *http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72*.

---

* * * *

The purpose of the joint signing was to have two important banking countries take action together, which was intended to, and did, send a strong signal to other countries. In the financial markets, being a signatory to this Convention has an effect even prior to ratification. That has in the Asian sector moved some forward in their consideration of whether to also sign the convention. It may take longer for a decision to be made within the European Union. . . .

The Convention in a nutshell provides tests to quickly and with predictability determine what law applies to securities interests which move easily across borders in seconds by computer. This allows expeditious determination of risk, value, pricing and in a shortfall or systemic risk situation, under what rules interests will be dealt with. That determination may need to be made ex ante or it may arise if there's a contest, for example, at a subsequent point as to priority of competing secured interests. The matter of applicable law may not be a fixed point, since securities interests may traverse a number of intermediaries and cross borders. The key is whether, when it is needed, the applicable law at the point at which it needs to be fixed can be done so expeditiously and without substantial due diligence. That is what the convention would do.

Based on financial industry meetings, the US financial community has seen this convention as serving two important objectives, one obvious, boosting the efficiency of global and national markets, and secondly, but no less importantly, reducing systemic risk concerns, one of the goals of US banking and securities regulators. This concern arises from modern market and transactional law developments since the 1980's including the growth in [sheer] volume of transactions and movements of securities by computer,

which travel through and are managed by entities known collectively as "intermediaries". The US securities system had systemic risk concerns in the late 1980's when bankruptcy issues of a major securities participant made obvious that "older" traditional laws that linked securities holdings to company property books could not work. There was no effective way to timely trace through and identify all the trades and interests, and even if eventually one might be able to do that, by that time the interference with ongoing market functions could present a systemic risk.

That led to the urgent revision of UCC Art. 8. . . . The UCC 8 solutions were agreed to as the convention's solution within the first hour of the diplomatic conference, when the EC, speaking for their member states, announced that they supported that approach as a means to enhance the efficiency of European securities markets.

* * * *

B. FAMILY LAW

1. International Enforcement of Maintenance Obligations

Draft Convention for the International Recovery of Child Support and Other Forms of Family Maintenance

The fourth session of the Special Commission on Maintenance of the Hague Conference on Private International Law met in The Hague from June 19-28, 2006, to continue negotiation of the draft Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. In preparation for the meeting, the United States submitted extensive comments on the tentative draft of the convention adopted in October 2005. Among other things, the U.S. comments indicated that, in order to become a party to the convention, the United States would have to exercise its right under Article 44 (Reservation on scope), as set forth below. *See* U.S. Comments at 24, Prel. Doc. No. 23, "Comments on the tentative draft Convention (Prel. Doc. No. 16)" available,

with other documents pertaining to the draft convention, at *www.hcch.net/index_en.php?act=progress.listing&cat=3.* At the end of 2006, a preliminary draft of the convention was being prepared, to reflect changes agreed to by the negotiators in June. The next Special Commission meeting is scheduled for May 2007, with the final diplomatic session anticipated in the fall of 2007. *See also Digest 2004* at 837-39, *Digest 2003* at 856-59, and *Digest 2002* at 842-58.

---

* * * *

1. In order for the United States to become a party to the new Convention, we would need to limit the scope of its application to child support, with two additions: first, we could agree to apply the Convention to requests (whether made through Central Authorities or directly to the competent authority) for recognition and enforcement of spousal support orders where there is also a child involved in the case; and second, we could also agree to accept the application of Chapters IV and V on Recognition and Enforcement (but not the chapters dealing with administrative[] cooperation) to "spousal-only" support orders, i.e., orders which do not involve a child.

2. The reasons for this position are grounded in our federal system. Under the U.S. Constitution, any power not explicitly granted to the federal government is reserved to the individual states. Family law, including maintenance, is one of those matters that traditionally has been governed by the laws of the individual U.S. states. Indeed, one of the reasons why the United States is not a party to the New York Convention [of 20 June 1956 on the Recovery Abroad of Maintenance] is that when it was concluded, the federal government did not play a major role in child support enforcement and it would have been difficult for the federal government to agree to a child support treaty that bound all of the states.

3. Obviously much has changed. The United States has a number of federal-level bilateral child support agreements, and we are taking an active role in the negotiation of this new Convention. What has made it much easier legally and politically for the federal

government to take such an active role in international child support is the fact that in recent years the federal government has, by means of conditions imposed on the granting of federal funds to state child support programs, been able to impose various requirements on state child support systems. Thus, the federal government can require the individual states to apply the Convention to child support cases. As all U.S. states recognize a spousal support obligation, we can also agree to apply the Convention's recognition and enforcement provisions to spousal support only cases that are submitted directly to the competent authority and do not require the services of the Central Authority.

4. We cannot undertake an obligation to apply the Convention to maintenance obligations based on any other type of relationship. We, therefore, will take a reservation to other family obligations. However, our reservation will be worded so that if an individual U.S. state chooses to recognize and enforce such decisions under the Convention, it may do so. Pursuant to the wording of our reservation, such actions would not invoke the services of the U.S. Central Authority.

On January 14, 2006, Mary Helen Carlson, Office of the Legal Adviser for Private International Law, addressed a joint conference of the European Commission and Hague Conference on Private International Law in Brussels, providing further explanation of the U.S. position set forth above on the scope of application of the convention. Ms. Carlson's remarks, excerpted below, are available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

II. BACKGROUND

In analyzing this issue, it is useful to keep in mind the following points:

1. The overwhelming majority of international family maintenance cases involve child support obligations. This point is acknowledged in the title to the draft Convention: It is the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

2. Many countries with the most developed child support systems, i.e., extensive government programs that assist custodial parents and children in the recovery of maintenance from non-custodial parents, restrict those systems to the recovery of child support. The systems cannot be used for the recovery of other forms of family maintenance.

3. At the same time, nearly all countries recognize support obligations toward spouses and ex-spouses, and some countries recognize obligations toward other relatives.

4. While some of those countries provide administrative services to applicants seeking to enforce maintenance obligations other than child support, in many countries there are no such services and the applicant must hire a private attorney and apply directly to the tribunal.

5. Finally, two of the major goals of the new Convention should be:

— widespread acceptance of the new Convention by a large number of countries all over the world; and
— the broadest possible range of services.

With those key points in mind, it is clear to us that we need to allow for a reservation so that countries that need to limit the scope of the Convention to child support can become parties. At the same time, we need to make the Convention available to countries that want to use it between themselves for the enforcement of other forms of family maintenance.

I would note that this is the solution found in the 1973 Convention, which allows a Contracting State to reserve the right not to recognize or enforce a decision in respect of maintenance between persons related collaterally or by affinity.

III. U.S. PERSPECTIVE

* * * *

. . . As a result of a federal requirement, every U.S. state has enacted the same statute, called the Uniform Interstate Family Support Act or UIFSA. Substantive child support law still varies

greatly from state to state. But the procedural rules for handling interstate and international child support cases are identical for every state. The legislation requiring states to adopt UIFSA as a condition to receiving federal funds is contained in Title IV-D of the Social Security Act. . . .

The drafters of UIFSA, a group appointed by the U.S. state legislatures and named the National Conference of Commissioners on Uniform State Laws, considered and rejected expansion of UIFSA to include duties of support other than the duties of child support and spousal support.

Thus, UIFSA defines a support duty as "an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse."

Although every state thus recognizes spousal support obligations as well as child support legislation, the federally funded IV-D program is limited to establishment, enforcement and modification of child support. This includes the establishment of paternity, where necessary to establish a support decision. These services are available at virtually no cost to applicants from countries with which we have a reciprocal agreement.

* * * *

2. Reciprocating Countries for Enforcement of Family Support Obligations

During 2006 the United States entered into two new bilateral agreements for the enforcement of maintenance obligations: Agreement Between the Government of the United States of America and the Government of Finland for the Enforcement of Maintenance (Support) Obligations, signed April 3, 2006 and Agreement Between the Government of the United States of America and the Government of El Salvador for the Enforcement of Maintenance Obligations, signed May 30, 2006. The full texts of the agreements are available at *www.state.gov/s/l/c8183.htm*.

The agreements state that they are entered into "[i]n accordance with section 459A of the Social Security Act, Title 42, United States Code, section 659A." Pursuant to that

statute, the Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare foreign countries or their political subdivisions to be reciprocating countries for the purpose of the enforcement of family support obligations if procedures for the determination and enforcement of duties of support for residents of the United States are in place or being undertaken.

Also during 2006, a diplomatic note from the Department of Foreign Affairs of the Republic of South Africa to the U.S. embassy in Pretoria stated that South Africa had nominated the United States as a designated country in terms of the South African Reciprocal Enforcement of Maintenance Orders Act, 1963 (Act 80 of 1963). It also asked whether the United States would make a corresponding designation of South Africa as a foreign reciprocating country for purposes of child support enforcement under U.S. law. In its reply note of December 11, 2006, the United States welcomed the initiative and indicated issues that would need to be addressed, as excerpted below. The full text of the U.S. note is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The Embassy is grateful [to] the Government of South Africa for this initiative, which is important to the protection of children in both of our countries. The United States Government would be pleased to discuss further with South African officials the possibility of our two countries entering into a reciprocal arrangement for the enforcement of child support obligations. Under U.S. law (Section 459A of the Social Security Act, 42 U.S.C. 659a), there are specific criteria that must be met before the Secretary of State may declare a foreign country to be a foreign reciprocating country for purposes of child support enforcement. The foreign country must have procedures in place, or must undertake to establish procedures that are substantially in conformity with the following standards: The foreign country must be able to establish new child support orders (including the establishment of paternity where necessary) for U.S. residents and to enforce existing U.S. child

support orders. This must be done at no cost to the U.S. applicant, and the foreign country must designate a Central Authority responsible for ensuring compliance with these standards.

The South African legislation referenced in the note addresses recognition and enforcement of foreign child support orders. It does not, however, address establishment of new orders for residents of foreign countries. It also does not address the cost of procedures. Legislation does not permit the United States to enter into a reciprocal arrangement solely for the recognition and enforcement of existing orders. Any such arrangement must also provide for the establishment of a new order in cases where the United States has no jurisdiction to establish an order in this country. (In our experience, the vast majority of our international requests are for recognition and enforcement of existing U.S. orders; but, occasionally there is a need to request the foreign country to establish a new order in favor of a U.S. applicant.) U.S. legislation also requires that the services under any reciprocal arrangement (including legal assistance, if necessary) must be provided at low or no cost to the U.S. applicant.

If South Africa is interested in entering into a reciprocal arrangement with the United States that would meet all of the criteria outlined above, the United States Government would be very interested in discussing this further. . . .

* * * *

C. INTERNATIONAL CIVIL LITIGATION

1. Concurrent Proceedings in Foreign Courts

a. Comity-based abstentions

(1) Mujica v. Occidental Petroleum Corp.

As discussed in Chapter 6.I.1.b., on March 17, 2006, the United States filed a brief as *amicus curiae* in the Ninth Circuit in support of affirmance of *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005). A U.S.

Supplemental Statement of Interest filed with the district court on December 30, 2004, stated that the United States "oppose[d] the pursuit of the instant litigation since it would severely impact this country's diplomatic relationship with Colombia." *See Digest 2004* at 376-80; *see also Digest 2005* at 418-24. In its 2006 *amicus* brief, the United States urged dismissal of the action on grounds including international comity, as excerpted below. The case was pending at the end of 2006.

---

* * * *

Permitting litigation in U.S. courts to second-guess the "findings of the Colombian courts," with "the potential for reaching disparate conclusions, may be seen as unwarranted and intrusive" by the Colombian government and as a refusal to accept the legitimacy of the Colombian judicial system. . . . In light of the existing damages judgment in favor of the plaintiffs, furthermore, permitting the plaintiffs to seek additional damages in this lawsuit would be inconsistent with the basic principle of Colombian law barring double recovery for the same harm.

The district court invoked these foreign policy interests as a basis for dismissal under the political question doctrine. . . .

In this case, however, it is not necessary for this Court to address the district court's holding that the plaintiffs' claims are barred by the political question doctrine, because the particular foreign policy interests identified by the United States' Supplemental Statement of Interest warrant dismissal of the litigation under the doctrine of international comity. As a matter of international comity, "United States courts ordinarily * * * defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy. . . . International comity seeks to maintain our relations with foreign governments, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. . . .

The district court properly recognized the "substantial interest" of the United States and the "strong interest" of our regional ally, Colombia, in having the lawfulness of military action reportedly taken by Colombian military officials in the course of fighting against insurgents in that country adjudicated exclusively in Colombian courts. . . . The district court also recognized that the plaintiffs have received an award of damages against the Colombian government in a Colombian court for the harm they suffered in the bombing, and that an appeal of that award is currently pending in Colombia. . . . The district court nonetheless declined to dismiss this litigation on international comity grounds, reasoning that Colombian courts provide an inadequate forum because the existing damages award to the plaintiffs, unless reversed on appeal, would be deemed "full reparation" for their harm and would preclude any claims for additional recovery from Occidental and AirScan.

Contrary to the district court's reasoning, the single-recovery rule of Colombian law (the same rule that applies under California law) . . . is itself entitled to respect as a matter of international comity. . . . In determining whether to dismiss a case in deference to foreign litigation, a U.S. court considers whether the foreign proceedings are "consistent with civilized jurisprudence" and U.S. public policy. . . . A foreign forum is not rendered fundamentally unfair simply because the plaintiffs' claims would be barred under a neutral principle of law. Here, the Colombian principle of single recovery is fully consistent with fundamental fairness and U.S. public policy. International comity thus provides an alternative ground for affirmance of the district court judgment.

* * * *

(2) Sarei v. Rio Tinto

As discussed in Chapter 6.I.a.(1), the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a lower court decision dismissing all claims in a case brought under the Alien Tort Statute based on allegations of human rights and other international law violations in Papua New Guinea ("PNG").

Sarei v. Rio Tinto, 456 F.3d 1069 (9th Cir. 2006).* Among other issues, the court "vacate[d] for reconsideration the district court's dismissal of the plaintiffs' . . . racial discrimination and [UN Convention on the Law of the Sea ('UNCLOS')] claims under the international comity doctrine" in light of its analysis of the weight to be given the U.S. Statement of Interest filed in the case, as excerpted here. Other issues in the opinion and the subsequent U.S. brief as *amicus curiae* supporting Rio Tinto's request for panel rehearing or rehearing *en banc* are discussed in Chapter 6.I.a.(2).

* * * *

C. International Comity

Under the international comity doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted. *See*, *e.g.*, *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); *In re Simon (Hong Kong & Shanghai Banking Corp. v. Simon)*, 153 F.3d 991, 998 (9th Cir. 1998) (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95 (1895)). *See also Sosa*, 542 U.S. at 761 (Breyer, J., concurring) (stressing that it is important for courts to ask "whether the exercise of jurisdiction under the AT[CA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

. . . The district court dismissed the plaintiffs' racial discrimination and UNCLOS claims under the comity doctrine.

* * * *

* As this volume of the *Digest* was going to press, on April 12, 2007, the Ninth Circuit withdrew its 2006 opinion, 2007 U.S. App. LEXIS 8387 (9th Cir. 2007), and issued a new opinion. 2007 U.S. App. LEXIS 8430 (9th Cir. 2007). The comity analysis and conclusion was unchanged in the 2007 opinion.

As a threshold matter, the parties disagree as to whether the district court applied the appropriate comity analysis. The plaintiffs argue that this circuit has interpreted Supreme Court precedent to require a predicate inquiry into whether a true conflict of law exists. *See In re Simon*, 153 F.3d at 999 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)) (limiting the application of the international comity doctrine to cases in which "there is in fact a true conflict between domestic and foreign law."). Rio Tinto asserts that we consider a conflict of law as only one of several factors. The district court agreed with the plaintiffs, and assumed that a conflict was a predicate requirement. *See Sarei*, 221 F. Supp. 2d at 1200-01. We agree with the district court, which followed Simon's clear statement.

The district court based its finding of a conflict on PNG's Compensation (Prohibition of Foreign Proceedings) Act of 1995 ("Compensation Act"), which "prohibit[s] the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea." *Sarei*, 221 F. Supp. 2d [1116,] 1201 [C.D. Cal. 2002)]. The district court reasoned that a conflict existed because, "[w]hile the ATCA vests jurisdiction in federal courts to hear plaintiffs' claims, the Compensation Act prohibits plaintiffs from filing the claims elsewhere than in PNG." *Id.* at 1201. This conclusion was not an abuse of discretion.

Given a conflict of laws, courts then look to the nonexhaustive standards set forth in Foreign Relations Law Restatement § 403(2) ("Section 403(2)"):

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person

> principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

See also cmt. b (explaining that the list of considerations in Section 403(2) is not exhaustive and "[n]ot all considerations have the same importance in all situations; the weight to be given to any particular factor depends upon the circumstances").

The district court concluded on the basis of the State Department's SOI that it would best serve the United States' interests to decline jurisdiction. *See Sarei*, 221 F. Supp. 2d at 1205. In addition, it found that the first two Restatement factors weighed in favor of declining jurisdiction on the racial discrimination and environmental harm claims because (1) all the conduct complained of occurred in PNG; (2) all the plaintiffs but the lead plaintiff, Sarei, are PNG residents; and (3) Rio Tinto, although not a PNG resident, has conducted significant business in, and has strong ties to, PNG. *Id.* at 1206. Finally, it concluded that an additional factor counseled dismissing the environmental harms because such claims arise out of PNG's exploitation of its natural resources. *See id.*

The district court acted within its discretion in determining that it should decline to hear these claims on comity grounds. However, . . . because we have rejected the district court's reliance

on the SOI in the context of the political question doctrine, we again consider it prudent to allow the district court to revisit its reliance on the SOI in the comity context. Further factual development may also be warranted to determine whether and how the Restatement factors apply to these claims. We therefore vacate the district court's comity ruling for reconsideration in light of our analysis of the SOI.

* * * *

(3) Royal and Sun Alliance Insurance Company of Canada v. Century International

In *Royal and Sun Alliance Insurance Company of Canada v. Century International*, 466 F.3d 88 (2d Cir. 2006), the Second Circuit vacated a decision by the U.S. District Court for the Southern District of New York dismissing an action in deference to a pending action in Canada. As the Second Circuit explained:

> Plaintiff-appellant Royal and Sun Alliance Insurance Company of Canada ("RSA") seeks damages from defendants-appellees Century International Arms, Inc. and Century Arms, Inc. (collectively "Century America") for the reimbursement of defense expenses and the payment of deductibles it claims to be owed under various insurance policies. Century America moved to dismiss the complaint in deference to a pending action previously filed by RSA in Canada against Century America's Canadian affiliate, Century International Arms Ltd. ("Century Canada"), based on the same insurance policies and the same factual allegations. The United States District Court for the Southern District of New York (Deborah A. Batts, Judge), granted defendants' motion, concluding that considerations of comity warranted dismissal of RSA's action against Century America.

The Second Circuit vacated and remanded to the district court, finding that although the district court could issue a temporary stay of the action on remand, a comity-based

abstention was not warranted. Excerpts follow (citations omitted). *See also Digest 2005* at 827-29.

---

* * * *

Century America argues that the district court's decision was supported by the doctrine of international comity abstention. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience." . . . While the doctrine can be stated clearly in the abstract, in practice we have described its boundaries as "amorphous" and "fuzzy." . . . In addition to its imprecise application, even where the doctrine clearly applies it "is not an imperative obligation of courts but rather is a discretionary rule of 'practice, convenience, and expediency.'" . . .

Often, a party invoking the doctrine of international comity seeks the recognition of a foreign judgment. In this case, however, Century America argues that concerns of comity favor the recognition of a pending foreign proceeding that has yet to reach final judgment, and that proper deference to that proceeding requires abstention in domestic courts. This type of comity has been termed the "comity of the courts." . . .

Generally, concurrent jurisdiction in United States courts and the courts of a foreign sovereign does not result in conflict. Rather, " . . . '[p]arallel proceedings in the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.'". . . . The mere existence of parallel foreign proceedings does not negate the district courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them." . . .

* * * *

In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency. . . . Proper consideration of these principles will no

doubt require an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction. . . . This list is not exhaustive, and a district court should examine the "totality of the circumstances," . . . to determine whether the specific facts before it are sufficiently exceptional to justify abstention.

In the present case, the district court did not identify any exceptional circumstances that would support abstention, and therefore the dismissal of the action was an abuse of discretion. The district court's decision to dismiss the action was based on four factors: the existence of the Canadian action against Century Canada, Century America's consent to jurisdiction in Canada, the affiliation between Century America and Century Canada, and the adequacy of Canadian judicial procedures. These factors led the district court to conclude that the action in Canada was a parallel action that provided an adequate forum for RSA's claims, and that therefore a dismissal of the case was warranted.

The district court's conclusion that the Canadian action is adequate and parallel merits a brief discussion. Century Canada and Century America are affiliated but separate entities. For two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions. . . . Whether Century Canada and Century America are substantially the same party for purposes of the relevant insurance policies was an issue raised in the Canadian action, where Century Canada asserted that it is not responsible for the obligations of Century America under the policies. The district court recognized that this issue was unsettled, but concluded that the question of which company is liable to RSA should be resolved in Canada. The fact that Century America is not a party to the Canadian action did not, in the district court's view, present a problem for the unified adjudication of RSA's claims because Century America had consented to the jurisdiction of the Canadian courts.

* * * *

. . . [W]e need not decide whether Century Canada and Century America are sufficiently similar to support a finding that the Canadian action is parallel to this case. Nor need we decide whether statute-of-limitations problems render a foreign forum inadequate in the context of international comity abstention. Even if we were to adopt the district court's conclusions that the Canadian action is a parallel action and that Canada provides an adequate forum for RSA's claims against Century America, those conclusions do not support the district court's dismissal of the action.

The existence of a parallel action in an adequate foreign jurisdiction must be the beginning, not the end, of a district court's determination of whether abstention is appropriate. As we explained above, circumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances, and therefore the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention. Rather, additional circumstances must be present—such as a foreign nation's interest in uniform bankruptcy proceedings—that outweigh the district court's general obligation to exercise its jurisdiction. The district court did not identify any such special circumstances.

Finally, both parties address the question of whether, as an alternative to dismissing the action, the district court should have considered staying proceedings in deference to the Canadian litigation. Because the propriety of a temporary stay was not raised in the district court, we do not decide whether the entry of such a stay would have been appropriate. However, on remand the district court may consider the propriety of a stay based on the pending Canadian action.

* * * *

b. Anti-suit injunctions

(1) E. & J. Gallo Winery v. Andina Licores, S.A.

In *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984 (9th Cir. 2006), the Ninth Circuit addressed a case stemming

from a distributorship agreement between Andina Licores ("Andina"), an Ecuadorian wine and liquor distributor and E & J Gallo Winery ("Gallo"), a California winery. The parties had a contractual relationship for over twenty-five years; their distributorship agreement contained forum selection and choice of law clauses in favor of California. Various disagreements arose between the parties and in July 2004 Andina filed suit against Gallo in court in Guayaquil, Ecuador. As noted by the court, "[a]lthough Gallo had identified its Ecuadorian lawyer in an April 19, 2004 letter to Andina, and although Andina and Gallo had been in a contractual relationship for over twenty-five years, Andina represented to the court that it did not know Gallo's whereabouts in Ecuador. . . . Andina asked the court to appoint a "*curador*": a guardian to act as counsel for Gallo and to appear for Gallo in any proceedings that Andina might file. Strangely, Andina was allowed to choose this guardian. . . ."

Andina filed suit alleging violation of a decree issued by the Ecuadorian military dictatorship in 1976 that had been repealed in 1997. The decree, which applied to distributorship agreements between Ecuadorian and foreign companies, mandated that all actions pursuant to the decree be brought in Ecuadorian courts, thereby potentially invalidating all forum selection clauses, and created summary procedures for such actions.

Gallo's *curador* contacted Gallo after the Ecuadorian case was well underway. Gallo hired an Ecuadorian attorney but was unable to submit evidence due to the expedited procedures. Gallo filed suit in U.S. district court seeking, among other things, an anti-suit injunction against the Ecuadorian court proceedings. The district court denied the injunction, largely based on comity considerations and Gallo appealed to the Ninth Circuit. The Ecuadorian court subsequently dismissed Andina's case, holding that the forum selection clause was valid. Nevertheless, as described by the Ninth Circuit, "a dizzying array of judgments, appeals, and procedural motions continued in Ecuador." The Ninth Circuit reversed the district court decision and remanded

with instructions to issue a preliminary injunction barring Andina from proceeding in Ecuador.

---

* * * *

Courts derive the ability to enter an anti-suit injunction from their equitable powers. Such injunctions allow the court to restrain a party subject to its jurisdiction from proceeding in a foreign court in circumstances that are unjust. . . . The injunction operates in personam: the American court enjoins the claimant, not the foreign court.

* * * *

. . . "A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly. The issue is not one of jurisdiction, but one of comity." . . . In *Seattle Totems* [*Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852 (9th Cir. 1981),] [w]e cited the Fifth Circuit's standard in *In re Unterweser Reederei Gmbh*, 428 F.2d 888, 896 (5th Cir. 1970) . . . as instructive: "foreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) where the proceedings prejudice other equitable considerations". . . . The language from *Unterweser* is disjunctive: if any of the four elements is present, an anti-suit injunction may be proper.

* * * *

The suitability of an anti-suit injunction involves different considerations from the suitability of other preliminary injunctions. An anti-suit injunction, by its nature, will involve detailed analysis of international comity. Often, as here, the injunction will be defensive in nature. Gallo has requested the preliminary injunction because of Andina's potentially prejudicial, vexatious and oppressive proceedings in Ecuador. But should Gallo also need to prove a likelihood of success on the merits of the breach of contract claim in order to receive an anti-suit injunction? That is, does our usual

test for a preliminary injunction apply, or is a modified analysis required for anti-suit injunctions? While our cases are not clear on this issue, we conclude that the more appropriate approach is that enunciated by the Fifth Circuit: "To the extent the traditional preliminary injunction test is appropriate, . . . we only need address whether [the injunction seeker] showed a likelihood of success on the merits. The merits in this case, however, are . . . about . . . whether [the injunction seeker] has demonstrated that the factors specific to an anti-suit injunction weigh in favor of granting that injunction here." . . .

Thus, we hold that Gallo need not meet our usual test of a likelihood of success on the merits of the underlying claim to obtain an anti-suit injunction against Andina to halt the Ecuadorian proceedings. Rather, Gallo need only demonstrate that the factors specific to an anti-suit injunction weigh in favor of granting the injunction. For purposes of this action, we may rely on any of the *Unterweser* factors if it applies to the case and if the impact on comity is tolerable. . . .

In applying this test, we believe the first step in determining whether an anti-suit injunction is appropriate is to determine "whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined." . . .

The district court concluded that the claims were not the same because the California and Ecuador cases arose from different acts. This conclusion was in error. In the Ecuadorian court, Andina sued for breach of contract. In the district court, Gallo sought, among other things, a declaration that Gallo did not breach the distributorship agreement. Therefore, all the issues before the court in the Ecuador action are before the court in the California action.

Andina contends that the claims are not the same because enjoining the Ecuador action would deprive it of its right to pursue its claims under Ecuadorian law. Not so. First, it is not clear that Andina has claims under Ecuadorian law, as the contract contains a choice-of-law clause in favor of California. Second, to the degree that Ecuadorian law does apply, federal courts are capable of applying it to Andina's claims. . . .

Turning to another aspect we thought instructive in *Seattle Totem,* "foreign litigation may be enjoined when it would . . . frustrate a policy of the forum issuing the injunction." *Seattle Totems,* 652 F.2d at 855, *see also In re Unterweser Reederei Gmbh,* 428 F.2d at 896. Gallo contends that an anti-suit injunction is necessary to preserve the United States policy encouraging enforcement of forum selection clauses. . . .

* * * *

. . . Andina has not given any reason to set aside the forum selection clause. An anti-suit injunction is the only way Gallo can effectively enforce the forum selection clause. In addition, Andina's potentially fraudulent conduct and procedural machinations in Ecuador tilt the balance even further in favor of granting the injunction. We hold that Andina's pursuit of litigation in Ecuador, in violation of the forum selection clause, frustrates a policy of the United States courts and may well be vexatious and oppressive.

This clear line of reasoning did not persuade the district court to enter a preliminary anti-suit injunction. Why? Because the district court concluded it was trumped by the doctrine of comity. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). It "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* at 163-64, 16 S.Ct. 139.

Although Andina's pursuit of litigation in Ecuador frustrates a policy of the United States, we still need to decide whether the impact on comity would be tolerable. . . .

* * * *

That Andina filed first . . . makes no difference as to the propriety of an anti-suit injunction. In a situation like this one, where private parties have previously agreed to litigate their disputes in a certain forum, one party's filing first in a different forum would not implicate comity at all. . . . Under the reasoning of the district

court, any party seeking to evade the enforcement of an otherwise-valid forum selection clause need only rush to another forum and file suit. Not only would this approach vitiate United States policy favoring the enforcement of forum selection clauses, but it could also have serious deleterious effects for international comity.

We also are puzzled by the district court's holding that "the Ecuadorian court is more competent to decide the key issue; that is, whether the provisions of Decree No. 1038-A apply or not." As stated above, the contract clearly contains a California choice-of-law clause; thus, the validity of the forum selection clause should be decided by California law, as the law of the contract, rather than by Ecuadorian law. . . . Additionally, to the degree Ecuadorian law is applicable, the district court is capable of applying it. . . .

* * * *

Andina has involved Gallo in messy, protracted, and potentially fraudulent litigation in Ecuador in direct contravention of a valid and enforceable forum selection clause. This is a paradigmatic case for a preliminary anti-suit injunction. The district court erroneously applied the law and, therefore, abused its discretion in denying the requested injunction. We reverse and remand to the district court with instructions to enter a preliminary injunction barring Andina from proceeding with litigation in Ecuador.

(2) Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.

In *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 435 F. Supp. 2d 919 (N.D. Iowa 2006), the U.S. District Court of Iowa issued a preliminary injunction enjoining a Japanese company from instituting a proceeding in Japan to recover the amount of a judgment against it for violation of the U.S. Antidumping Act of 1916, 15 U.S.C. § 72. The claim arose from a judgment in favor of Goss International Corporation ("Goss") against Japanese defendant Tokyo Kikai Seisusho ("TKS") for violations of the 1916 Act that included a 2003 treble-damage award of over $31 million and a 2004 award of attorneys' fees and expenses of approximately $4 million. On December 3, 2004, Congress repealed the Anti-dumping

Act of 1916, but excluded all pending actions from the repeal; accordingly, the judgment against TKS was not affected. On December 8, 2004, the Special Measures Law Concerning the Obligation of Return of the Benefits and the Like under the United States Antidumping Act of 1916" ("Japanese Special Measures Law") entered into force in Japan. As described by the court, "the law, a so-called 'clawback statute,' authorizes Japanese parties, against whom a U.S. judgment has been rendered under the 1916 Act, to sue in Japan to recover the full amount of the judgment, interest and expenses, including attorney fees."

The parties had stipulated that TKS would not file suit in Japan pursuant to the Special Measures Law until it had exhausted its appeals from the district court judgment. On January 23, 2006, the Eighth Circuit affirmed the court's judgment in all respects. *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft,* 434 F.3d 1081, 1083 (8th Cir. 2006), *reh'g and reh'g en banc denied,* 2006 U.S. App. LEXIS 9557 (8th Cir. 2006), *cert denied sub nom. Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp.,* 126 S. Ct. 2363 (2006). On June 8, 2006, Goss filed a motion in the district court requesting that the district court enjoin TKS from filing suit in Japan, which TKS resisted. The district court issued a preliminary injunction, finding that "its interest in protecting the integrity of its judgments and jurisdiction outweighs concerns over international comity," as excerpted below (internal headings omitted). Goss's request for a permanent injunction was pending at the end of 2006.

---

* * * *

In the Eighth Circuit, applications for preliminary injunctions are generally measured against the standards set forth in *Dataphase Systems, Inc. v. C Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). . . . The party moving for a preliminary injunction has the burden of establishing entitlement to such relief. . . . The court must consider four factors: (1) the moveant's likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting

the injunction will inflict on other interested parties; and (4) whether the grant of a preliminary injunction is in the public interest.

* * * *

Goss contends that because it has prevailed on the merits of its claims under the 1916 Act, it has "already prevailed on the merits," and thus the first *Dataphase* factor weighs in favor of granting a preliminary injunction. The court cannot accept this argument. Goss's requirement for a permanent injunction and its original Complaint alleging a violation of the 1916 Act are separate legal issues—indeed, the latter was resolved at all levels of the federal judiciary days before the former was even filed. The court agrees with TKS that the correct question before the court on this *Dataphase* factor is "whether Goss is likely to prevail on its motion for an anti-suit injunction." . . .

* * * *

Beyond this threshold question, there is presently a circuit split as to what factors a court must consider before issuing an antisuit injunction. . . . The difference between the two approaches concerns how much weight the court should give to considerations of international comity. . . . The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 115 . . . (1895). . . .

The court finds that, under either the liberal or conservative approach, Goss has met his burden. Even among those courts that afford international comity the greatest respect, it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment. . . .

The court finds that TKS's intended invocation of the Japanese Special Measures Law is a direct attack on this court's judgment in favor of Goss and a frontal assault on the jurisdiction of this court and the federal judiciary as a whole. "[A] direct interference with the jurisdiction of [an] United States court justifie[s] the defensive

issuance of an antisuit injunction . . . " *Gau Shan,* 956 F.2d at 1356 (citing *Laker Airways,* 731 F.2d at 915). In effect, TKS seeks to institute a lawsuit "for the sole purpose of terminating" this court's judgment in Goss's favor, thereby in a single filing attempting to undo six years of federal court litigation. *See id.* (discussing *Laker Airways*). The court finds TKS's proposed litigation in Japan, after six years of litigation in the Untied States, is clearly vexatious and oppressive.

The court does not dispute the affidavit testimony of TKS's expert, Professor George Bermann, who opines that the issuance of an anti-suit injunction in this case would be deeply offensive to the Japanese government. The court is aware that the issuance of a preliminary injunction in this case may have international repercussions. Weighing all the factors and looking at this case in its procedural context, however, the court finds that its interest in protecting the integrity of its judgments and jurisdiction outweighs concerns over international comity.

The court's conclusion is strengthened by the unique circumstances of this case. The court's decision is consistent with the decisions of the legislative and executive branches of the United States government. When Congress passed the bill repealing the 1916 Act and the President signed it, the legislative and executive branches deliberately chose to enact a law that operates prospectively. Miscellaneous Trade & Technical Corrections Act of 2004, Pub.L. No. 108-429, § 2006(b), 118 Stat. 2434, 2597 (2004). Moreover, Congress was aware of this particular case, the jury's award and that the defendant was a Japanese company. *See* H.R. Rep. 108-415, at 17 (2004) ("The only 1916 Act case now pending is an Iowa case in which a jury found $10.5 million in actual damages against a Japanese company on December 3, 2003."). Congress and the President were also presumably aware that the Japanese government wanted a retroactive repeal of the 1916 Act. It was and remains the position of the Japanese government that the 1916 Act and this court's judgment was and is in violation of the United States' obligations as a member of the World Trade Organization. . . . The fact that the legislative and executive branches were aware of this court's judgment and deliberately chose *not* to undo it through a retroactive repeal of the

1916 Act must inform the weight this court must give to international comity in this case. It is not the province of this court or the federal judiciary in general to rewrite the foreign policy of the United States government, as expressed by the legislative and executive branches of government.

* * * *

The next factor the court must consider is the degree of irreparable harm, if any, Goss would suffer if the court does not grant the preliminary injunction. . . .

The court finds that Goss would suffer great harm if the court does not grant the preliminary injunction. This harm is not limited to TKS's ability to clawback the judgment at issue from Goss's Japanese subsidiary, Goss Japan. At the Hearing, Goss's executive vice-president, chief financial officer and secretary, Joseph Patrick Gaynor, III, testified. Mr. Gaynor is a member of the Board of Directors of Goss Japan. Mr. Gaynor testified that Goss Japan is currently running a "break even operation." If TKS sues Goss Japan under the Japanese Special Measures Law, lenders might balk at loaning Goss Japan money. Goss Japan's customers—in essence its unsecured creditors—would be wary to advance money for Goss Japan's products. Based on Mr. Gaynor's testimony and the court's own common sense, the court finds that the Japanese Special Measures Law poses a threat to the survival of Goss Japan and would thus harm Goss.

* * * *

The court finds the threat of irreparable harm to Goss in this case outweighs the harm to TKS that may be occasioned by its inability to avail itself of the Japanese Special Measures Law while the court considers Goss's Motion for Permanent Injunction. The court will rule upon the Motion for Permanent Injunction expeditiously. This factor, therefore, weighs in favor of the issuance of the requested preliminary injunction.

The final factor the court must consider in determining whether to issue the requested preliminary injunction is whether public interest favors preventing TKS from availing itself of the Japanese Special Measures Law while the court considers Goss's Motion for

Permanent Injunction. The court finds that it does. . . . It is clear that the public has an interest in preserving the jurisdiction of the federal judiciary. Moreover, the legislative and executive branches, acting in the public interest, have determined that the court's judgment should be enforced. This factor therefore weighs in favor of the issuance of the requested preliminary injunction.

Because all four *Dataphase* factors weigh in favor of the issuance of a preliminary injunction, the court shall grant Goss's Motion. The court stresses, however, that it does not purport to enjoin the government of Japan or the Japanese judiciary; rather, it is enjoining TKS from availing itself of the Japanese Special Measures Law. Even so, the court does not enjoin a party from availing itself of a foreign remedy lightly. The court also stresses that this is only a "preliminary assessment" pending consideration of Goss's request for a permanent injunction. . . . The court recognizes that "[t]he equities of this situation . . . may change." . . . The court finds, however, that, at this moment, justice requires it to intervene to preserve the *status quo* until the merits of Goss's request for a permanent injunction are determined after fuller consideration.

* * * *

2. Forum Non Conveniens

In *Malaysia International Shipping Corp. v. Sinochem International Co. Ltd.*, 436 F.3d 349 (3d Cir. 2006), the Third Circuit reversed a district court's dismissal on *forum non conveniens* grounds. In that case, Sinochem claimed that Malaysia International Shipping Corp. ("MISC") had fraudulently backdated a bill of lading in order to meet contract obligations in the sale and shipment of steel coils. On June 8, 2003, Sinochem petitioned the Guangzhou Admiralty Court in China for "preservation" of a maritime claim against MISC and for the "arrest of the Vessel" when it arrived in China, which the Chinese court ordered, claiming that MISC had fraudulently backdated the bill of lading.

On June 23, 2003, MISC filed suit in the Eastern District of Pennsylvania against Sinochem, alleging that Sinochem had negligently misrepresented the vessel's fitness and suitability to load its cargo to the Chinese court. On July 2, 2003, Sinochem filed a complaint with the Chinese court alleging damage due to MISC's alleged backdating of the bill of lading to April 30, 2003, when in fact the goods were loaded on May 1, 2003. MISC then moved to dismiss the Chinese action on jurisdiction grounds, which the Chinese court denied, and the Guangdong Higher People's Court affirmed on appeal. Sinochem filed a motion to dismiss the U.S. action for lack of subject matter and personal jurisdiction and for *forum non conveniens.*

The district court concluded that it had subject matter jurisdiction, but did not have personal jurisdiction, although it contemplated that personal jurisdiction might be established with jurisdictional discovery. The district court ultimately declined to order jurisdictional discovery because it concluded that dismissal was appropriate on *forum non conveniens* grounds. The Ninth Circuit affirmed the lower court's finding of subject matter jurisdiction, but held that the district court should have determined whether personal jurisdiction existed before dismissing on *forum non conveniens* grounds because "jurisdiction—both subject matter and personal jurisdiction—is a *sine qua non* for *forum non conveniens*."*

On September 26, 2006, the U.S. Supreme Court granted Sinochem's petition for a writ of certiorari. 127 S.Ct. 36 (2006). In November 2006 the United States submitted a brief as *amicus curiae* in support of Sinochem as petitioner, available at *www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0102.mer.ami.html*. The United States explained its interest in the case as follows:

> This case presents the question whether a federal district court must conclusively determine that it has jurisdiction

* On March 7, 2007, as this volume was going to press, the Supreme Court reversed the Ninth Circuit. *Sinochem International Co. Ltd. v. Malaysia International Shipping Corporation*, 127 S. Ct. 1184 (2007). The opinion will be discussed as relevant in Digest 2007.

over a case before it may dismiss the case under the *forum non conveniens* doctrine. The resolution of that question will have policy implications for the United States with respect to both domestic and foreign litigation.

The doctrine of *forum non conveniens* arises in the federal courts exclusively in the context of a request that the court defer to adjudication of the parties' dispute in the courts of a foreign nation. In many cases over the past several years, defendants in suits brought under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 et seq., or Alien Tort Statute (ATS), 28 U.S.C. 1350, have sought dismissal on non-merits threshold grounds such as *forum non conveniens*, international comity, and the political question doctrine, in deference to resolution of the plaintiff's claim in the country where the wrong took place. On several occasions, the United States has appeared as *amicus* and argued that the courts may dismiss on such grounds without deciding difficult questions of jurisdiction, which often can turn on questions which could be very sensitive to the foreign government whose conduct is at issue. The United States has a significant interest in maintaining the federal courts' ability to avoid unnecessary adjudication in cases that, for example, may involve delay, burdensome or sensitive discovery, or examination of difficult legal issues. The United States also invokes the doctrine of *forum non conveniens* on its own behalf as a party to litigation abroad. The doctrine is not unique to the United States (indeed, it did not originate here), but rather is incorporated into the law of a variety of countries. *See American Dredging Co. v. Miller*, 510 U.S. 443, 449-450 (1994). A holding by this Court that a court must conclusively establish jurisdiction before dismissing a case on *forum non conveniens* grounds could have an adverse impact on the United States when it raises that or similar non-merits grounds for dismissal in foreign litigation.

3. Gathering Evidence Abroad

a. Lopes v. Lopes

In 2006 the Eleventh Circuit was the first circuit court to publish an opinion regarding judicial assistance to foreign tribunals pursuant to 28 U.S.C. § 1782* since the U.S. Supreme Court's decision in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004) (*see Digest 2004* at 851-56). The Eleventh Circuit case, *Lopes v. Lopes*, 180 Fed. Appx. 874 (11th Cir. 2006), involved a divorce proceeding pending in Brazilian court. In January 2004 the Brazilian Court sent a letter to Delta National Bank and Trust Company in Miami, Florida asking for information relating to the existence of any financial assets held in the husband's name, and requesting that 50% of such assets, if found, be blocked in order to aid the Brazilian court during its proceedings. In January 2005 the wife filed an action in the District Court for the Southern District of Florida appointing Miami counsel, who issued subpoenas for the previously-requested information pursuant to 28 U.S.C. §1782, as well as for information regarding her husband's accounts from Safra National Bank's Miami branch. The husband filed a motion for a protective order and to quash the subpoenas and vacate the ex parte order appointing the wife's local counsel, alleging that the wife was using §1782 to circumvent discovery restrictions under Brazilian law. The district court transferred the case to a magistrate judge, who compelled discovery of

* 28 U.S.C. §1782(a) provides in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure . . . A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

15-Cummins-Chap15.indd 966 10/22/07 11:47:27 PM

documents from both banks. The husband filed an objection to the magistrate's order, which the district court denied, and the husband appealed. Applying the test set out in *Intel*, the Eleventh Circuit affirmed the magistrate's order compelling the banks to produce the requested information, as excerpted below.

---

* * * *

Husband claims that the Magistrate and District Court erred in applying the *Intel* factors, and granted Wife "unprecedented and unauthorized relief" under § 1782 by authorizing discovery from the Miami banks that "goes far beyond the scope" of the request from the Brazilian Court. Specifically, Husband claims that the District Court misapplied the first of the *Intel* factors and granted overly broad relief by ordering bank account documents from Delta National Bank and Safra National Bank, even though Judge de Castro's letter only requested "information" (and not, specifically, bank records) and failed to mention Safra National Bank.

Intel states that in exercising its discretion to consider a § 1782 request, a district court should consider the following factors:

> First, when the person from whom discovery is being sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid is generally not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .
>
> Second, as the 1964 Senate report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. *Intel,* 542 U.S. at 264, 124 S.Ct. at 2483 (citations and quotations omitted).

Husband claims that the first *Intel* factor should be read against Wife because Husband is a "participant in the foreign proceeding." *Id.* The District Court found that this reading would render the introductory clause of the first factor—"the person from whom discovery is sought"—a nullity, and would therefore be incompatible with a proper reading of the statute as a whole. The District Court concluded that "the entities from whom the discovery is sought are the banks, not the husband."

We agree. The text of *Intel* supports this reading by noting that a foreign tribunal "has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Id.* That phrase from *Intel* makes clear that the "person from whom discovery is sought" must therefore be a person or entity outside of the jurisdiction of the foreign tribunal, which the Miami banks in this case clearly are. More importantly, Husband is well within the jurisdiction of the foreign tribunal, since his divorce proceeding is currently before the Brazilian Court. The only logical reading of *Intel* points to the bank (or banks) as the "person from whom discovery is sought," and the District Court's application of the *Intel* factors was correct.

* * * *

Finally, Husband contends that even if the District Court properly interpreted § 1782 and exercised its discretion in response to Judge de Castro's letter, it erred in granting Wife's request to compel documents from Safra National Bank, which was not explicitly included as one of the entities from whom information was requested in the letter from the Brazilian Court. As Wife points out in her brief, Judge de Castro's order pursuant to which the Delta National Bank letter was written stated that the Brazilian Court was seeking the "real truth" about the parties' assets in order to reach a fair result. The District Court's order compelling records from Safra National Bank was consistent with this purpose.

Nor is there any indication from the text of § 1782 or *Intel* that the District Court is limited to compelling information from those parties specifically mentioned in the request letter issued by the foreign tribunal. . . . Further, *Intel* notes legislative history that "leaves issuance of an appropriate order to the discretion

of the court." *Intel,* 542 U.S. at 260, 124 S.Ct. at 2481. We conclude that it was within the discretion of the District Court to include Safra National Bank in its order compelling information in this case pursuant to § 1782.

* * * *

b. Judicial assistance requests by Microsoft Corporation

In 2004 the European Commission's ("EC") Directorate-General for Competition ("DG-Competition") concluded an investigation of Microsoft's actions in the EU market, finding that Microsoft infringed European antitrust law. The EC adopted findings by the DG-Competition, imposed a fine on Microsoft, and ordered it to remedy the violation. On December 21, 2005, the EC issued a Statement of Objections charging that Microsoft still had not complied with its obligations. In anticipation of a hearing on the Statement of Objections, Microsoft requested, among other things, access to documents in the Commission's file pertaining to correspondence between the Commission and Sun, Oracle, IBM, and Novell, which were provided to Microsoft, following waivers of confidentially by the third parties.

On March 2, 2006, Microsoft filed an application to the Commission for further discovery, requesting certain relevant material that might not be in the Commission's file. The following day, Microsoft filed *ex parte* applications pursuant to 28 U.S.C. § 1782 in three U.S. district courts—the Southern District of New York, the District of Massachusetts, and the Northern District of California—seeking permission to serve subpoenas *duces tecum* to third parties that might be holding such documents. The EC filed submissions in all three courts explicitly stating its opposition to Microsoft obtaining the requested information pursuant §1782, as it would allow Microsoft to circumvent its procedures. All three district courts granted motions by the third parties to quash the subpoenas. *In re Application of Microsoft Corp.,* 2006 U.S. Dist. LEXIS 24870 (N.D. Cal. 2006); *In re Application of Microsoft*

Corp., 2006 U.S. Dist. LEXIS 32577 (D. Mass. 2006), and *In re Application of Microsoft Corp.*, 428 F. Supp. 2d 188 (S.D.N.Y. 2006).

The district court of Massachusetts reasoned that "[w]here, as here: the foreign tribunal can obtain the documents at issue and provide them to Microsoft; that tribunal does not want the involvement of this court; and there is no showing of fundamental unfairness in the absence of intervention, considerations of comity strongly favor quashing the subpoena." 2006 U.S. Dist. LEXIS 32577, at *13. The U.S. District Court for the Northern District of California concluded that "[t]his situation involves a tribunal's specific order restricting a specific litigant's ability to gather evidence. Under these circumstances, the subpoenas constitute an attempt to circumvent specific restrictions the [EC] has placed on Microsoft's right to obtain certain kinds of information. This alone weighs heavily against allowing the requested discovery." 2006 U.S. Dist. LEXIS 32577 at *10. That court also emphasized that because the EC "is *not* receptive to U.S. federal court judicial assistance in this case," "[a]s a matter of comity, this court is unwilling to order discovery when doing so will interfere with the [EC]'s orderly handling of its own enforcement proceedings." *Id.* Similarly, the U.S. District Court for the Southern District of New York concluded that "[g]ranting discovery in the face of opposition from the foreign tribunal would undermine the spirit and purpose of the statute by discouraging that and other foreign tribunals from 'heeding similar sovereignty concerns posited by our governmental authorities to foreign courts.'" 428 F. Supp. 2d at 194.

4. Service of Process Abroad: *BP Products North America, Inc. v. Dagra*

In *BP Products North America, Inc.*, 236 F.R.D. 270 (E.D. Va. 2006), the district court granted a motion by the plaintiff to serve an evasive defendant thought to reside in Pakistan by publication in two Pakistani Newspapers. BP Products North

America, Inc. ("BP Products") filed suit against defendant, Owais Dagra, seeking to enforce defendant's alleged personal guarantee of over $12 million in defaulted business loans. After two years of attempting to locate the defendant, BP Products had learned only that Dagra might be residing somewhere in Karachi, Pakistan. BP Products had unsuccessfully attempted to serve Dagra pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 20 U.S.T. 361 (the "Hague Convention"), and through local counsel (as authorized by the same court in 2005; *see Digest 2005* at 858-59). Excerpts below from the court's 2006 decision explain its decision to grant BP Products' motion for alternative service by publication pursuant to Federal Rule of Civil Procedure 4(f)(3).

---

* * * *

As noted in previous opinions in this case, the Court has no doubt that the Defendant is willfully evading the service of process. Both the United States and Pakistan are signatories to [the Hague Convention]. Plaintiff has made numerous attempts to serve Defendant under the terms of the Hague Convention, but Plaintiff's efforts have failed to reveal Defendant's current whereabouts. The Hague Convention does not apply in cases where the address of the foreign party to be served is unknown. 20 U.S.T. 361 (U.S.T.1969). Therefore, Plaintiff, with permission of this Court, attempted alternative service on Defendant's local attorney who was representing Defendant on another matter. All of these attempts were to no avail, and Plaintiff is seeking the Court's assistance.

* * * *

Rule 4(f) governs service of process upon individuals in foreign countries and provides three mechanisms of service:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the

> Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice: . . . or (3) by other means not prohibited by international agreement as may be directed by the court.

Fed.R.Civ.P. 4(f).

Since the Hague Convention does not apply when a defendant's address is unknown and the attempts at service have been futile, the third method under 4(f)(3) is applicable. In this case, Plaintiff requests that the Court order alternative service by publication of notice in two Pakistani newspapers circulated in Defendant's last-known location.

The Court is afforded wide discretion in ordering service of process under Rule 4(f)(3), which "provides the Court with . . . flexibility and discretion . . . empowering courts to fit the manner of service utilized to the facts and circumstances of the particular case." . . . .

In order to fulfill due process requirements under Rule 4(f)(3), the Court must approve a method of service that is "reasonably calculated, under all the circumstances" to give notice to defendant. . . .

* * * *

From the limited case law in the area, it is clear that service by publication to a defendant in a foreign country is an acceptable alternative means under 4(f)(3), so long as diligent attempts have been made to locate the defendant and serve process by traditional means, and the publication is one that likely would reach the defendant. Additionally, courts in previous cases have noted the importance of the defendant possessing some knowledge that he might be subject to a suit. . . . In the case at hand, Plaintiff has attempted service twice under the Hague Convention, hired an investigative services firm in Pakistan that was unable to locate Defendant, and attempted to serve Defendant through his local counsel. Notice by mail is impossible in this case, since the

Defendant's exact whereabouts are unknown. Plaintiff proposes publishing notice in two newspapers with wide circulation throughout Pakistan: the *Daily Jang,* which is published in Urdu, and the *Dawn,* which is published in English. Since Defendant operated a multi-million dollar business in the United States and personally guaranteed Promissory Notes for millions of dollars, which he is aware are currently in default, he would be on notice that he might be the subject of a lawsuit concerning his business. In addition, his business experience in the United States demonstrates that Defendant should be readily able to understand a notice in English. While publication should be in both the Urdu and the English newspapers to increase the likelihood Defendant will see it, the notice can be published in English since there is ample evidence Defendant could understand it. A notice printed in English in general-subject newspapers with wide circulation in the area of his last-known whereabouts is reasonably calculated to give Defendant specific notice of the pending action.

* * * *

Cross References

International adoption, abduction, and parental access, **Chapter 2.B.**
Judicial assistance, **Chapter 2.D.**
International comity, **Chapter 8.B.1.c.**

Chapter 16

Sanctions

A. IMPOSITION OF SANCTIONS

1. Sudan

a. Expansion of National Emergency

On April 25, 2006, the UN Security Council, acting under Chapter VII with respect to the situation in Sudan, adopted Resolution 1672, deciding that all states "shall implement the measures specified in paragraph 3 of resolution 1591 (2005) with respect to [certain named] individuals." In Executive Order 13400 of April 26, 2006, President George W. Bush expanded the national emergency with respect to Sudan first declared on November 3, 1997, by Executive Order 13067. 71 Fed. Reg. 25,483 (May 1, 2006). Excerpts follow describing the sanctions ordered by the President, effective April 27, 2006. The sanctions were renewed for another six months by Presidential Notice of November 1, 2006, 71 Fed. Reg. 64,629 (Nov. 2, 2006).

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*)(IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*)(NEA), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c)(UNPA), and section 301 of title 3, United States Code,

16-Cummins-Chap16.indd 975 10/22/07 11:48:16 PM

I, GEORGE W. BUSH, President of the United States of America, find that an unusual and extraordinary threat to the national security and foreign policy of the United States is posed by the persistence of violence in Sudan's Darfur region, particularly against civilians and including sexual violence against women and girls, and by the deterioration of the security situation and its negative impact on humanitarian assistance efforts, as noted by the United Nations Security Council in Resolution 1591 of March 29, 2005, and, to deal with that threat, hereby expand the scope of the national emergency declared in Executive Order 13067 of November 3, 1997, with respect to the policies and actions of the Government of Sudan, and hereby order:

Section 1. (a) Except to the extent that sections 203(b) (1), (3), and (4) of [the International Emergency Economic Powers Act] IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)) may apply, or to the extent provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order [those listed in Resolution 1672]; and

(ii) any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

(A) to have constituted a threat to the peace process in Darfur;

(B) to have constituted a threat to stability in Darfur and the region;

(C) to be responsible for conduct related to the conflict in Darfur that violates international law;

(D) to be responsible for heinous conduct with respect to human life or limb related to the conflict in Darfur;

(E) to have directly or indirectly supplied, sold, or transferred arms or any related materiel, or any assistance, advice, or training related to military activities to:

(1) the Government of Sudan;
(2) the Sudan Liberation Movement/Army;
(3) the Justice and Equality Movement;
(4) the Janjaweed; or
(5) any person (other than a person listed in subparagraph (E)(1) through (E)(4) above) operating in the states of North Darfur, South Darfur, or West Darfur that is a belligerent, a nongovernmental entity, or an individual;

(F) to be responsible for offensive military overflights in and over the Darfur region;

(G) to have materially assisted, sponsored, or provided financial, materiel, or technological support for, or goods or services in support of, the activities described in paragraph (a)(ii)(A) through (F) of this section or any person listed in or designated pursuant to this order; or

(H) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person listed in or designated pursuant to this order.

(b) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the type of articles specified in such section by, to, or for the benefit of any person listed in or designated pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13067 and expanded in this order, and I hereby prohibit such donations as provided by paragraph (a) of this section.

(c) The prohibitions of paragraph (a) of this section include, but are not limited to, (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person listed in or designated pursuant to this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 2. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

Sec. 4. For those persons listed in or designated pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that, for these measures to be effective in addressing the national emergency declared in Executive Order 13067 and expanded by this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

* * * *

b. Darfur Peace and Accountability Act of 2006

On October 13, 2006, President George W. Bush signed into law the Darfur Peace and Accountability Act of 2006 ("DPAA"), Pub. L. No. 109-344, 120 Stat. 1869. Among other things, § 7 of the DPAA provided that current restrictions were to be continued "until the President certifies to the appropriate congressional committees that the Government of Sudan is acting in good faith" to

(1) implement the Darfur Peace Agreement;

(2) disarm, demobilize, and demilitarize the Janjaweed and all militias allied with the Government of Sudan;

(3) adhere to all associated United Nations Security Council Resolutions, . . .

(4) negotiate a peaceful resolution to the crisis in eastern Sudan;

(5) fully cooperate with efforts to disarm, demobilize, and deny safe haven to members of the Lord's Resistance Army in Sudan; and

(6) fully implement the Comprehensive Peace Agreement for Sudan without manipulation or delay, by [taking specified steps].

Section 8 authorized the President "notwithstanding any other provision of law . . . to provide economic assistance for Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum" and authorized specified military assistance in certain circumstances to the Government of Southern Sudan. Section 8(e) provided:

> Notwithstanding any other provision of law, the prohibitions set forth with respect to Sudan in Executive Order No. 13067 (62 Fed. Reg. 59989) shall not apply to activities or related transactions with respect to Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum.

On the same date, President Bush signed Executive Order 13412, Blocking Property of and Prohibiting Transactions with the Government of Sudan. 71 Fed. Reg. 61,369 (Oct. 17, 2006), excerpted below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq*.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq*.) (NEA), and section 301 of title 3, United States Code, and taking appropriate account of the Darfur Peace and Accountability Act of 2006 (the "Act"),

I, GEORGE W. BUSH, President of the United States of America, find that, due to the continuation of the threat to the national security and foreign policy of the United States created by certain policies and actions of the Government of Sudan that violate human rights, in particular with respect to the conflict in Darfur, where the Government of Sudan exercises administrative and legal authority and pervasive practical influence, and due to the threat

to the national security and foreign policy of the United States posed by the pervasive role played by the Government of Sudan in the petroleum and petrochemical industries in Sudan, it is in the interests of the United States to take additional steps with respect to the national emergency declared in Executive Order 13067 of November 3, 1997. Accordingly, I hereby order:

Section 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) or in regulations, orders, directives, or licenses that may be issued pursuant to this order, all property and interests in property of the Government of Sudan that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Sec. 2. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all transactions by United States persons relating to the petroleum or petrochemical industries in Sudan, including, but not limited to, oilfield services and oil or gas pipelines, are prohibited.

Sec. 3. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 4. (a) Subject to paragraph (b) of this section, restrictions imposed by this order shall be in addition to, and do not derogate from, restrictions imposed in and under Executive Order 13067.

(b)(i) None of the prohibitions in section 2 of Executive Order 13067 shall apply to activities or related transactions with respect to Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum, provided that the activities or transactions do not involve any property or interests in property of the Government of Sudan.

(ii) The Secretary of State, after consultation with the Secretary of the Treasury, may define the term "Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum" for the purposes of this order.

* * * *

Also on October 13, a letter from the President to Congress described the executive order and its effort to reconcile sections 7 and 8 of the DPAA as excerpted below. 42 WEEKLY COMP. PRES. DOC. 1826 (Oct. 23, 2006).

---

* * * *

. . . [T]he Darfur Peace and Accountability Act of 2006 (DPAA), . . . among other things, calls for support of the regional government of Southern Sudan, assistance with the peace efforts in the Darfur region of Sudan, and provision of economic assistance in specified areas of Sudan. Section 7 of the DPAA maintains the sanctions currently imposed on the Government of Sudan. However, section 8(e) of the DPAA exempts from the prohibitions of Executive Order 13067 certain areas in Sudan, including Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum.

. . . In light of [my] determinations, and in order to reconcile sections 7 and 8 of the DPAA, I issued this order to continue the country wide blocking of the Government of Sudan's property and to prohibit transactions relating to the petroleum and petrochemical industries in Sudan.

* * * *

The order specifies that Executive Order 13067 remains in force, but that the prohibitions in section 2 of that order shall not apply to activities and transactions with respect to Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, or marginalized areas in and around Khartoum, provided that the activities or transactions do not involve any property or interests in property of the Government of Sudan.

On November 17, 2006, the Office of Foreign Assets Controls, Department of the Treasury, issued interpretive guidance "to assist U.S. persons in complying with Executive Order 13412 . . . and in understanding the relationship of these provisions to the sanctions imposed by Executive Order 13067 of November 3, 1997." *See www.treasury.gov/offices/enforcement/ofac/actions/20061117.shtml.* The OFAC interpretive guidance outlined the prohibitions and exempt areas of Sudan under E.O. 13412 and provided further guidance as follows (footnotes omitted).

* * * *

Transshipments

Although trade and humanitarian assistance are exempt in the areas of Sudan listed above, all other areas of Sudan continue to be subject to the prohibitions imposed by E.O. 13067 as set forth in the SSR. These prohibitions apply to imports or exports that transit the non-exempt areas of Sudan, such as Khartoum and Port Sudan, en route to or from the exempt areas of Sudan.

Therefore, exports from the United States or by a U.S. person, wherever located, to the exempt areas of Sudan that do not transit non-exempt areas of Sudan do not require authorization from OFAC, provided that the Government of Sudan does not have an interest in the transaction and the transaction does not relate to Sudan's petroleum or petrochemical industries. Similarly, imports into the United States of Sudanese-origin goods from the exempt areas of Sudan that do not transit non-exempt areas of Sudan do not require authorization from OFAC, provided that the Government of Sudan does not have an interest in the transaction and the transaction does not relate to Sudan's petroleum or petrochemical industries. For example, an export of household goods to a nongovernmental organization working in a private orphanage located in Blue Nile State is exempt to the extent it does not transit the non-exempt areas of Sudan.

Although section 538.405 of the SSR provides that transactions "ordinarily incident to a licensed transaction" are authorized, this

provision does not apply to transactions exempted by section 4(b) of E.O. 13412. Thus, while transshipments or supporting financial transactions may be considered "ordinarily incident" to exports licensed by OFAC, they are not deemed to be ordinarily incident to transactions in the exempt areas of Sudan and therefore require authorization from OFAC.

Financial Transactions

Financial transactions involving third-country depository institutions or non-designated Sudanese depository institutions located and headquartered in the exempt areas of Sudan that do not involve activity in the non-exempt areas of Sudan are no longer prohibited and do not require authorization from OFAC, provided that the Government of Sudan does not have an interest in the transaction and the transaction does not relate to Sudan's petroleum or petrochemical industries. However, unless otherwise authorized, financial transactions that involve in any manner depository institutions that are located in the non-exempt areas of Sudan are prohibited.

For example, if a financial transaction involves a branch of a depository institution in the exempt areas of Sudan, but that depository institution is headquartered in Khartoum and requires all financial transactions to be routed through the headquarters or another branch located in the non-exempt areas of Sudan, that transaction is prohibited and requires authorization from OFAC.

2. Belarus

In Executive Order 13405 of June 16, 2006, President George W. Bush determined:

> The actions and policies of certain members of the Government of Belarus and other persons to undermine Belarus' democratic processes or institutions, manifested most recently in the fundamentally undemocratic March 2006 elections, to commit human rights abuses related to political repression, including detentions and disappearances, and to engage in public corruption, including by diverting or misusing Belarusian public assets or by

misusing public authority, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. . . .

71 Fed. Reg. 35,485 (June 20, 2006). The President declared a national emergency, citing his authority under the Constitution, IEEPA, the NEA, and 3 U.S.C. § 301. Section one of the executive order blocked the property and interests in property in the United States, or in the possession or control of United States persons of persons listed in the annex to the order and

> (ii) any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:
>
> (A) to be responsible for, or to have participated in, actions or policies that undermine democratic processes or institutions in Belarus;
>
> (B) to be responsible for, or to have participated in, human rights abuses related to political repression in Belarus;
>
> (C) to be a senior-level official, a family member of such an official, or a person closely linked to such an official who is responsible for or has engaged in public corruption related to Belarus;
>
> (D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, the activities described in paragraphs (a)(ii)(A) through (C) of this section or any person listed in or designated pursuant to this order; or
>
> (E) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person listed in or designated pursuant to this order.

Language in § 1 describing the blocking and §§ 2 and 4 are as included in Executive Order 13400 concerning Sudan, excerpted in 1.a.*supra*.

3. Syria

On April 25, 2006, President Bush issued Executive Order 13399, Blocking Property of Additional Persons in Connection

with the National Emergency with Respect to Syria. 71 Fed. Reg. 25,059 (Apr. 28, 2006). This action expanded sanctions imposed with respect to Syria in Executive Order 13338 of May 11, 2004 (69 Fed. Reg. 26,751 (May 13, 2004)). *See Digest 2004* at 900-02. Excerpts below from Executive Order 13399 describe the further sanctions, citing the President's authority under the Constitution, IEEPA, the NEA, § 5 of the UN Participation Act, 3 U.S.C. § 301, and "in view of United Nations Security Council Resolution (UNSCR) 1636 of October 31, 2005." Language in § 1 of Executive Order 13399 describing the blocking and §§ 2 and 4 are as set forth in Executive Order 13400 concerning Sudan, excerpted in 1.a. *supra*.

---

* * * *

I, GEORGE W. BUSH, President of the United States of America, determine that it is in the interests of the United States to (1) assist the international independent investigation Commission (the "Commission") established pursuant to UNSCR 1595 of April 7, 2005, (2) assist the Government of Lebanon in identifying and holding accountable in accordance with applicable law those persons who were involved in planning, sponsoring, organizing, or perpetrating the terrorist act in Beirut, Lebanon, on February 14, 2005, that resulted in the assassination of former Prime Minister of Lebanon Rafiq Hariri, and the deaths of 22 others, and other bombings or assassination attempts in Lebanon since October 1, 2004, that are related to Hariri's assassination or that implicate the Government of Syria or its officers or agents, and (3) take note of the Commission's conclusions in its report of October 19, 2005, that there is converging evidence pointing to both Lebanese and Syrian involvement in terrorist acts, that interviewees tried to mislead the Commission's investigation by giving false or inaccurate statements, and that a senior official of Syria submitted false information to the Commission. In light of these determinations, and to take additional steps with respect to the national emergency declared in Executive Order 13338 of May 11, 2004, concerning certain actions of the Government of Syria, I hereby order:

Section 1. . . . [the blocking of the property and interests in property in the United States, or in the possession or control of

United States persons of]: persons determined by the Secretary of the Treasury, after consultation with the Secretary of State,

(i) to be, or to have been, involved in the planning, sponsoring, organizing, or perpetrating of:

(A) the terrorist act in Beirut, Lebanon, that resulted in the assassination of former Lebanese Prime Minister Rafiq Hariri and the deaths of 22 others; or

(B) any other bombing, assassination, or assassination attempt in Lebanon since October 1, 2004, that is related to Hariri's assassination or that implicates the Government of Syria or its officers or agents;

(ii) to have obstructed or otherwise impeded the work of the Commission established pursuant to UNSCR 1595;

(iii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any such terrorist act, bombing, or assassination attempt, or any person designated pursuant to this order; or

(iv) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person designated pursuant to this order.

* * * *

4. Iran

The Office of Foreign Assets Control ("OFAC"), Department of the Treasury, amended its Iranian Transactions Regulations ("ITR") in a final rule signed September 7, 2006, explaining:

> To cut off Bank Saderat from the U.S. financial system, OFAC is making three amendments to the ITR that effectively prohibit all transactions directly or indirectly involving Bank Saderat. OFAC is amending Sec. 560.516, a general license authorizing payment and U.S. dollar clearing transactions involving Iran, to revoke its applicability to Bank Saderat. OFAC is also amending Sec.560.405, an interpretive section, and Sec. 560.532(b), a statement of licensing policy, to exclude Bank Saderat from the scope of these provisions.

71 Fed. Reg. 53,569 (Sept. 12, 2006). Brief excerpts below from the Background section of the rule further describe the action.

---

* * * *

The Iranian Transactions Regulations, 31 CFR part 560 (the "ITR"), implement a series of Executive orders, beginning with Executive Order 12957, issued on March 15, 1995, under the authority of the International Emergency Economic Powers Act (50 U.S.C. 1701-1706) ("IEEPA"). In that order, the President declared a national emergency with respect to the actions and policies of the Government of Iran, including its support for international terrorism, its efforts to undermine the Middle East peace process, and its efforts to acquire weapons of mass destruction and the means to deliver them. To deal with that threat, Executive Order 12957 imposed prohibitions on certain transactions with respect to the development of Iranian petroleum resources. On May 6, 1995, the President issued Executive Order 12959 imposing comprehensive trade sanctions to further respond to this threat, and on August 19, 1997, the President issued Executive Order 13059 consolidating and clarifying the previous orders.

The Office of Foreign Assets Control ("OFAC") is amending the ITR to cut off Bank Saderat, one of the largest Iranian government-owned banks, from the U.S. financial system. Bank Saderat has been a significant facilitator of Hizballah's financial activities and has served as a conduit between the Government of Iran and Hizballah, Hamas, the Popular Front for the Liberation of Palestine-General Command, and Palestinian Islamic Jihad.

* * * *

In addition to the amendments relating to Bank Saderat, OFAC is also making a technical amendment to Sec. 560.516. Paragraph (a)(1) of Sec. 560.516 authorizes U.S. depository institutions to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer is by order of a non-Iranian foreign bank from its own account in a domestic bank to an account held by a domestic bank for a second non-Iranian foreign bank. OFAC is amending this

paragraph by deleting the word "second" to clarify that U.S. depository institutions are authorized to make transfers between accounts held by different branches of the same non-Iranian foreign bank.

Effective August 22, 2006, OFAC amended the Iranian Transactions Regulations by adding a new general license authorizing U.S. persons who are employees or contractors of six international organizations to perform transactions for the conduct of the official business of those organizations in or involving Iran. 71 Fed. Reg. 48,795 (Aug. 22, 2006). The Background section of the final rule is excerpted below.

---

* * * *

In light of the U.S. interest in promoting the hiring and retention of Americans by international organizations, the Treasury Department's Office of Foreign Assets Control ("OFAC") today is amending the ITR, effective immediately, to add a new general license authorizing U.S. persons who are employees or contractors of six international organizations to perform transactions for the conduct of the official business of these organizations in or involving Iran. Paragraph (a) of new ITR § 560.539 specifies that the performance of transactions for the conduct of the official business of the United Nations, the World Bank, the International Monetary Fund, the International Atomic Energy Agency, the International Labor Organization or the World Health Organization by U.S. persons who are employees or contractors thereof is authorized, except as provided in paragraph (b) of the new section.

Paragraph (a) of § 560.539 also provides examples of authorized transactions, such as: the provision of services involving Iran necessary for carrying out the official business; purchasing Iranian goods and services for use in carrying out the official business; leasing office space and securing related goods and services; funds transfers to or from the accounts of the international organizations specified in the license, provided that funds transfers to or from Iran are not routed through an account of an Iranian bank on the books of a U.S. financial institution; and the operation of accounts for the

employees and contractors in Iran, provided that transactions conducted through the accounts are solely for the employee's or contractor's personal use and not for any commercial purposes in or involving Iran, and any funds transfers to or from an Iranian bank are routed through a third-country bank that is not a U.S. person.

Paragraph (b) of § 560.539 provides that this new general license does not authorize (1) The exportation from the United States to Iran of any goods or technology listed on the Commerce Control List in the Export Administration Regulations, 15 CFR part 774, supplement No. 1 (CCL); (2) the reexportation to Iran of any U.S.-origin goods or technology listed on the CCL; or (3) the exportation or reexportation to Iran of any services not necessary and ordinarily incident to the international organization's official business in Iran. Such transactions require separate authorization from OFAC.

* * * *

On July 20, 2006, OFAC issued a Statement of Licensing Policy on Support of Democracy and Human Rights in Iran and Academic and Cultural Exchange Programs, stating: "Consistent with current U.S. foreign policy, the following Statement of Licensing Policy establishes a favorable licensing regime through which U.S. persons can request OFAC approval of participation in projects in support of the Iranian people." The full text of the policy, excerpted below, is available at *www.treasury.gov/offices/enforcement/ofac/actions/20060720a.shtml.*

---

* * * *

a. Specific licenses may be issued on a case-by-case basis to authorize U.S. nongovernmental organizations and other corporate entities to engage in the following projects or activities in or related to Iran that are designed to directly benefit the Iranian people:

1. Projects, including conferences and training, to support human rights, democratic freedoms and democratic institutions and to meet basic human needs; and

2. The establishment or support of independent civic organizations.

b. Specific licenses may be issued on a case-by-case basis to authorize U.S. persons (both entities and individuals) to engage in the following projects or activities in or related to Iran that are designed to directly benefit the Iranian people:

1. The provision of donated professional medical services;
2. Certain targeted educational, cultural and sports exchange programs, provided such programs are not in furtherance of Iranian military, industrial or technological infrastructure or potential;
3. Environmental projects, provided such projects are not in furtherance of Iranian military or industrial infrastructure or potential; and
4. Projects, including exchanges and technical training, to improve the flow of public information through independent media available to the Iranian public.

c. Specific licenses issued pursuant to this policy generally will not authorize the exportation or reexportation to Iran of goods (including software) and technology listed on the Commerce Control List in the Export Administration Regulations, 15 C.F.R. Part 774, supplement No. 1 (CCL).

* * * *

5. Palestinian Authority

a. Revisions to terrorism-related regulations

Following a January 2006 election, the new government of the Palestinian Authority ("PA") formed by Hamas was sworn in on March 29, 2006. As indicated below, Hamas is subject to a number of terrorism-related sanctions in the United States. Effective May 10, 2006, the Office of Foreign Assets Control, Department of the Treasury, issued a final rule revising terrorism-related regulations to add general licenses authorizing

certain actions in connection with the PA. 71 Fed. Reg. 27,199 (May 10, 2006). Department of the Treasury jurisdiction was based on a determination that Hamas has a property interest in the transactions of the Palestinian Authority; the Department of State does not view the democratically-elected PA as an alter ego of Hamas. The Background section of the final rule explained the amendments as excerpted below.

OFAC administers three sanctions programs with respect to terrorists and terrorist organizations. The Terrorism Sanctions Regulations, 31 CFR part 595 ("TSR"), implement Executive Order 12947 of January 23, 1995, in which the President declared a national emergency with respect to "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process." The Global Terrorism Sanctions Regulations, 31 CFR part 594 ("GTSR"), implement Executive Order 13224 of September 23, 2001, in which the President declared an emergency more generally with respect to "grave acts of terrorism and threats of terrorism committed by foreign terrorists." The Foreign Terrorist Organizations Sanctions Regulations, 31 CFR part 597 ("FTOSR"), implement provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

HAMAS, members of which now form the majority party within the Palestinian Legislative Council and hold positions of authority within the government including the position of Prime Minister, is a target of each of these sanctions programs, resulting in the blocking of any property and interests in property of HAMAS that are in the United States or hereafter come within the United States, or that are in or hereafter come within the possession or control of a United States person. These restrictions prohibit U.S. persons from dealing in property or interests in property of HAMAS. OFAC has determined that, as a result of the recent elections, HAMAS has a property interest in the transactions of the Palestinian Authority. Accordingly, pursuant to the TSR, the GTSR and the FTOSR, U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized. Notwithstanding the prohibitions, OFAC, consistent with current foreign policy, is authorizing U.S. persons to engage in certain transactions in which the Palestinian Authority may have an interest. It should be noted that the prohibitions involving the Palestinian

Authority do not bar all transactions involving individuals and entities in Palestinian territory.

* * * *

The rule added new provisions to subparts D and E of the Terrorism Sanctions Regulations, Global Terrorism Sanctions Regulations, and Foreign Terrorist Organizations Sanctions to allow specified transactions and activities otherwise prohibited. As provided in the amendments to the Global Terrorism Sanctions Regulations, the rule allowed (1) transactions and activities (a) related to the official business of the United Nations and (b) outside the United States in support of official duties of U.S. persons "who are employees of the governments of states bordering the West Bank or Gaza"; (2) transactions by U.S. persons with the Palestinian Authority "incident to travel to or from, or employment, residence or personal maintenance within the jurisdiction of the Palestinian Authority"; (3) payment by U.S. persons of taxes and incidental fees to the Palestinian Authority "incident to such persons' day-to-day operations"; (4) all transactions by U.S. persons with specified entities of the Palestinian Authority President; the Palestinian Judiciary; members of the PLC who were not elected to the PLC on the party slate of Hamas or "any other designated Foreign Terrorist Organization (FTO), Specially Designated Terrorist (SDT), or Specially Designated Global Terrorist (SDGT)"; and "the following independent agencies: the Central Elections Commission; the Independent Citizens Rights Commission; the General Audit Authority/External Audit Agency; and the Palestinian Monetary Authority"; (5) transactions and activities with the Palestinian Authority "necessary to conclude ongoing contracts or programs" with the PA; and (6) in-kind donations of medicine to the Palestinian Authority Ministry of Health by nongovernmental organizations that are U.S. persons.

The new rule did not authorize any payment involving a "debit to an account of the Palestinian Authority on the books of a U.S. financial institution or to any account blocked pursuant to" the regulations being amended.

On July 6, 2006, "based on foreign policy considerations," the Office of Foreign Assets Control ("OFAC") expanded

General License 6 for in-kind donations to include "medical services and medical devices, which include medical supplies." *See www.treasury.gov/offices/enforcement/ofac/actions/20060710.shtml. See also* Guidelines on Transactions with the Palestinian Authority, issued by OFAC on July 20, 2006, available at *www.treasury.gov/offices/enforcement/ofac/actions/20060720b.shtml.*

b. Palestinian Anti-Terrorism Act of 2006

On December 1, 2006, President Bush signed into law the Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446. Sections 2 and 3 of the act amended the Foreign Assistance Act of 1961, as amended ("FAA"), adding new sections 620K, "Limitation on Assistance to the Palestinian Authority," and 620L, "Limitation on Assistance for the West Bank and Gaza." New § 620K makes assistance under the FAA available to "the Hamas-controlled Palestinian Authority" only during a period in which the President certifies to Congress that he has determined that

> (1) no ministry, agency, or instrumentality of the Palestinian Authority is effectively controlled by Hamas, unless the Hamas-controlled Palestinian Authority has—
>
> (A) publicly acknowledged the Jewish state of Israel's right to exist; and
>
> (B) committed itself and is adhering to all previous agreements and understandings with the United States Government, with the Government of Israel, and with the international community, including agreements and understandings pursuant to the Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (commonly referred to as the 'Roadmap'); and
>
> (2) the Hamas-controlled Palestinian Authority has made demonstrable progress toward—
>
> (A) completing the process of purging from its security services individuals with ties to terrorism;

(B) dismantling all terrorist infrastructure within its jurisdiction, confiscating unauthorized weapons, arresting and bringing terrorists to justice, destroying unauthorized arms factories, thwarting and preempting terrorist attacks, and fully cooperating with Israel's security services;
(C) halting all anti-American and anti-Israel incitement in Palestinian Authority-controlled electronic and print media and in schools, mosques, and other institutions it controls, and replacing educational materials, including textbooks, with materials that promote peace, tolerance, and coexistence with Israel;
(D) ensuring democracy, the rule of law, and an independent judiciary, and adopting other reforms such as ensuring transparent and accountable governance; and
(E) ensuring the financial transparency and accountability of all government ministries and operations.

Section 640K also provides a Presidential national security waiver limited to certain expenses related to the function of the President of the PA and for the judiciary branch of the PA and other entities. New § 620L limits assistance to nongovernmental organizations for the West Bank and Gaza to periods for which a certification is in effect with respect to the PA under § 620K, with certain exceptions.

Sections 5 through 8 of the act provide that certain actions related to visa denials for PA authorities, travel restrictions, prohibition on PA representation in the United States, and U.S. positions in international financial institutions "should" be taken. Section 9 prohibits use of funds for negotiation with members or official representatives of Palestinian terrorist organizations.

President Bush issued a statement on signing the law, excerpted below and available in full at 42 WEEKLY COMP. PRES. DOC. 2199 (Dec. 25, 2006).

---

* * * *

The executive branch shall construe section 7 of the Act, which relates to establishing or maintaining certain facilities or establishments within the jurisdiction of the United States, in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs, including the authority to receive ambassadors and other public ministers.

The executive branch shall construe as advisory the provisions of the Act, including section 9, that purport to direct or burden the conduct of negotiations by the executive branch with entities abroad. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, including protection of American citizens and American military and other Government personnel abroad, and to supervise the unitary executive branch.

6. Cote d'Ivoire

On February 7, 2006, President Bush issued Executive Order 13396, blocking property of certain persons contributing to the conflict in Cote d'Ivoire "to assist in addressing humanitarian, safety, and other concerns in or in relation to the country of Cote d'Ivoire." 71 Fed. Reg. 7389 (Feb. 10, 2006). Excerpts follow from the executive order. Authorities cited by the President and language in § 1 describing the blocking and §§ 2 and 4 are as set forth in Executive Order 13400 concerning Sudan, excerpted in 1.a. *supra*.

---

* * * *

I, GEORGE W. BUSH, President of the United States of America, determine that the situation in or in relation to Cote d'Ivoire, which has been addressed by the United Nations Security Council in Resolution 1572 of November 15, 2004, and subsequent resolutions, that has resulted in the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and attacks against international peacekeeping forces leading to fatalities, constitutes an unusual and extraordinary

threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat, and hereby order:

Section 1. . . . [the blocking of the property and interests in property in the United States, or in the possession or control of United States persons of]:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

> (A) to constitute a threat to the peace and national reconciliation process in Cote d'Ivoire, such as by blocking the implementation of the Linas-Marcoussis Agreement of January 24, 2003, the Accra III Agreement of July 30, 2004, and the Pretoria Agreement of April 6, 2005;
> (B) to be responsible for serious violations of international law in Cote d'Ivoire;
> (C) to have directly or indirectly supplied, sold, or transferred to Cote d'Ivoire arms or any related materiel or any assistance, advice, or training related to military activities;
> (D) to have publicly incited violence and hatred contributing to the conflict in Cote d'Ivoire;
> (E) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, the activities described in paragraphs (a)(ii)(A), (a)(ii)(B), (a)(ii)(C), or(a)(ii)(D) of this section or any person listed in or designated pursuant to this order; or
> (F) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person listed in or designated pursuant to this order.

* * * *

7. Democratic Republic of the Congo

On October 27, 2006, President Bush issued Executive Order 13413, "Blocking Property of Certain Persons Contributing

to the Conflict in the Democratic Republic of the Congo." 71 Fed. Reg. 64,105 (Oct. 31, 2006). Excerpts follow from the executive order. Authorities cited by the President and language in § 1 describing the blocking and §§ 2 and 4 are as set forth in Executive Order 13400 concerning Sudan, excerpted in 1.a. *supra*.

I, GEORGE W. BUSH, President of the United States of America, determine that the situation in or in relation to the Democratic Republic of the Congo, which has been marked by widespread violence and atrocities that continue to threaten regional stability and was addressed by the United Nations Security Council in Resolution 1596 of April 18, 2005, Resolution 1649 of December 21, 2005, and Resolution 1698 of July 31, 2006, constitutes an unusual and extraordinary threat to the foreign policy of the United States and hereby declare a national emergency to deal with that threat. To address that threat, I hereby order:

Section 1. . . . [the blocking of the property and interests in property in the United States, or in the possession or control of United States persons of]:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

(A) to be a political or military leader of a foreign armed group operating in the Democratic Republic of the Congo that impedes the disarmament, repatriation, or resettlement of combatants;
(B) to be a political or military leader of a Congolese armed group that impedes the disarmament, demobilization, or reintegration of combatants;
(C) to be a political or military leader recruiting or using children in armed conflict in the Democratic Republic of the Congo in violation of applicable international law;
(D) to have committed serious violations of international law involving the targeting of children in situations of armed conflict in the Democratic Republic of the Congo,

including killing and maiming, sexual violence, abduction, and forced displacement;
(E) to have directly or indirectly supplied, sold, or transferred to the Democratic Republic of the Congo, or been the recipient in the territory of the Democratic Republic of the Congo of, arms and related materiel, including military aircraft and equipment, or advice, training, or assistance, including financing and financial assistance, related to military activities;
(F) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, the activities described in subsections (a)(ii)(A) through (E) of this section or any person listed in or designated pursuant to this order; or
(G) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person listed in or designated pursuant to this order.

* * * *

8. Cuba

The Commission for Assistance to a Free Cuba ("CAFC"), established on October 10, 2003, provided its first report to President Bush on May 6, 2004. *See Digest 2004* at 903-12. On July 10, 2006, President Bush approved the second report of the CAFC and a Compact. President Bush also directed the implementation of the report's recommendations, which included improving enforcement of existing sanctions to maintain economic pressure on the regime to limit its ability to sustain itself and repress the Cuban people. The full texts of the report and compact, with related documents, are available at *www.cafc.gov; see also* White House fact sheet at *www.whitehouse.gov/news/releases/2006/07/20060710-1.html. See also* discussion of litigation challenging authority to impose Cuban sanctions in trademark case, B.3.a. below, and U.S. objections to resolutions by Cuba concerning the U.S. trade embargo in Chapter 6.A.3.

B. OTHER ISSUES

1. Terrorism

On September 28, 2006, Ambassador Jackie Sanders, U.S. Alternative Representative to the UN for Special Political Affairs, addressed the Security Council Joint Public Meeting on the Counter-Terrorism Committee, Al-Qaida/Taliban (1267) Committee, and Counter-Proliferation Committee. Excerpts follow from her remarks concerning the Counter-Terrorism and 1267 Committees.

---

* * * *

Counter-Terrorism Committee:

* * * *

We are pleased that the Committee has adopted a set of best practices relevant to the implementation of resolution 1373, which we hope states will rely on for guidance. This directory refers to standards established by international technical organizations, and we are particularly glad that it refers to the Financial Action Task Force's Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing.

We also welcome the Committee's recent report to the Council on implementation of resolution 1624. As the Committee continues its dialogue with states and considers what might be done in spreading best legal practices, consistent with its mandate, the Committee will need to continue to reflect appropriately two aspects of resolution 1624. Significantly, this resolution was constructed carefully to reflect both (1) the international community's sense that incitement to terrorism is an important issue to be an addressed, and (2) the importance of respecting free expression as protected by diverse constitutional systems.

Finally, we are pleased that the Committee and its [Executive Directorate ("CTED")] are continuing their state visits and their important capacity-building work. The ten visits CTED has completed since 2005 mark an achievement, but their success will be measured by the results they achieve. Follow up on these visits is

essential to ensure that states carry out CTED's recommendations and receive the technical assistance they need to do so.

1267 Committee:

. . . Over the last 120 days, the Committee has taken important, concrete actions to sanction al-Qaida associates and entities in Europe, Africa, the Middle East, and Asia. The geographic diversity highlights al-Qaida's global reach and underlines the importance of a truly international effort to combat it. We encourage all members of the UN to become active participants in the 1267 process by submitting names for the Committee's sanctions list, and we are pleased that the Committee approved a new coversheet that will make it easier for States to prepare requests for listing.

* * * *

Looking ahead, we urge the Committee to continue to focus attention on the issue of Member State compliance with the 1267 sanctions regime, and we look forward to the Monitoring Team's upcoming paper on the issue. We also want to highlight progress made on fair and clear procedures for listing and delisting individuals for sanctions. The United States has been working hard with other Member States, both on and off the Security Council, to revise listing and de-listing guidelines. We are optimistic that Council members will reach agreement soon as we all approach this matter with the seriousness it deserves.

* * * *

2. Procedures for Listing and De-listing Designated Individuals and Entities

As noted in Ambassador Sanders' remarks *supra*, during 2006 the Security Council addressed the issue of due process in the listing and de-listing of individuals for terrorist sanctions. On June 22, 2006, the President of the Security Council issued a Presidential Statement, S/PRST/2006/28, in which he stated, among other things:

> The Security Council considers sanctions an important tool in the maintenance and restoration of international

> peace and security. The Council resolves to ensure that sanctions are carefully targeted in support of clear objectives and are implemented in ways that balance effectiveness against possible adverse consequences. The Council is committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions. The Council reiterates its request to the 1267 Committee to continue its work on the Committee's guidelines, including on listing and delisting procedures, and on the implementation of its exemption procedures contained in resolution 1452 (2002) of 20 December 2002.

In a statement to the Security Council on June 22, 2006, at its thematic debate on strengthening international law, rule of law, and the maintenance of international peace and security, Ambassador Bolton noted among other things, that targeted sanctions regimes established by the Security Council "play a crucial role in combating international terrorism and in efforts to end violence and establish stability in countries including Sudan, Cote d'Ivoire, Liberia, and the Democratic Republic of the Congo." Addressing the U.S. commitment to due process in designating individuals and entities subject to sanctions, Ambassador Bolton continued:

> There has been a good deal of recent discussion about whether steps may be taken to increase fairness and transparency in the implementation of targeted sanctions. It is a priority of the United States to make the lists of individuals and entities that the Security Council targets for sanctions as accurate as possible and to make the process as fair and transparent as practicable. The 1267 Committee has recently begun consideration of several interesting proposals aimed at increasing the fairness and transparency of the Committee's work. We were one of the countries that submitted a proposal.* We look

* Editor's note: The submissions to the 1267 Committee are considered confidential.

forward to working with Council members in the context of these discussions in the 1267 Committee to consider these proposals and to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security.

See www.un.int/usa/06_136.htm.

On October 6, Ambassador Bolton responded to criticism of the procedures in a letter to the editor of the Wall Street Journal, excerpted below. The full text of Ambassador Bolton's letter, responding to an October 2 article by David Crawford "The Black Hole of a U.N. Blacklist," is available at *www.state.gov/s/l/c8183.htm*.

. . . The U.N. Security Council has rightly imposed sanctions on hundreds of al Qaeda members and the Taliban. These sanctions have made it harder for terrorists to acquire weapons, move freely around the world, and finance their plots. Member states have frozen $150 million in terrorist assets, which Mr. Crawford fails to acknowledge.

Mr. Crawford's central argument is that terrorists are stripped of their assets without hearings or the right to appeal. He profiles three men under U.N. sanctions for supporting al Qaeda and highlights that none of them has been criminally convicted by a court. Obviously, the U.N. is not a court, and sanctions are not a criminal punishment. Terrorist designations made by the Security Council are based on international security and policy considerations, and they are designed as a preventive tool to cripple terrorists and their networks.

Mr. Crawford is wrong when he claims that individuals under U.N. sanctions cannot appeal the decision. In the United States, those designated have the right to challenge the decision through administrative channels or by turning directly to the court system, and many have done so. However, every challenged designation has been upheld by U.S. courts, including at the appellate level. The U.N. has also lifted sanctions, in cases where the individual severed his ties to al Qaeda.

Mr. Crawford is also wrong in stating that the Security Council does not debate designations. In fact, they are debated extensively, usually over a period of many months. By way of example, we approved sanctions for Saad al-Fagih, a known associate of Osama bin Laden, Abdelghani Mzoudi, a member of the Hamburg cell that planned 9/11, and Mamoun Darkazanli, a known al Qaeda financier. These are the same three people Mr. Crawford cites to prove the system is broken. I believe they prove the system is working. . . .

> In December 2006 the UN Security Council adopted two resolutions that, among other things, addressed this issue. Resolution 1730, sponsored by the United States and France, was adopted on December 19, 2006. Resolution 1730 recalled the Presidential statement of June 22 and adopted a de-listing procedure in a document annexed to the resolution. In the de-listing procedure, the "Security Council request[ed] the Secretary-General to establish, within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests. Petitioners seeking to submit a request for de-listing can do so either through the focal point process outlined [in the annex] or through their state of residence or citizenship."
>
> In Resolution 1735, adopted December 22, 2006, the Security Council decided in operative paragraph 1 that states must take the measures, *i.e.,* impose the sanctions, previously imposed
>
> > by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000), paragraphs 1 and 2 of resolution 1390 (2002), with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the "Consolidated List"):
>
> including freezing funds and other financial assets or economic resources, preventing entry into or transit through their territories, and preventing the direct or indirect supply, sale, or transfer of arms and related material of all types.

Paragraphs 5-18 of Resolution 1735 concerned the listing and delisting of individuals and entities to whom the sanctions apply, as excerpted below.

[The Security Council]

* * * *

Listing

5. *Decides* that, when proposing names to the Committee for inclusion on the Consolidated List, States shall act in accordance with paragraph 17 of resolution 1526 (2004) and paragraph 4 of resolution 1617 (2005) and provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided; States should include details of any connection between the proposed designee and any currently listed individual or entity;

6. *Requests* designating States, at the time of submission, to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed individual or entity, and those parts which may be released upon request to interested States;

7. *Calls upon* States to use the cover sheet attached in Annex I when proposing names for the Consolidated List, in order to ensure clarity and consistency in requests for listing;

* * * *

10. *Decides* that the Secretariat shall, after publication but within two weeks after a name is added to the Consolidated List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known), and include with this notification a copy of the publicly releasable portion of the statement of case, a description of the effects of designation, as set forth in the

relevant resolutions, the Committee's procedures for considering delisting requests, and the provisions of resolution 1452 (2002);

11. *Calls upon* States receiving notification as in paragraph 10 to take reasonable steps according to their domestic laws and practices to notify or inform the listed individual or entity of the designation and to include with this notification a copy of the publicly releasable portion of the statement of case, a description of the effects of designation, as provided in the relevant resolutions, the Committee's procedures for considering delisting requests, the provisions of resolution 1452 (2002);

* * * *

Delisting

13. *Decides* that the Committee shall continue to develop, adopt, and apply guidelines regarding the de-listing of individuals and entities on the Consolidated List;

14. *Decides* that the Committee, in determining whether to remove names from the Consolidated List, may consider, among other things, (i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List;

* * * *

The Security Council also decided, in paragraph 32, "in order to assist the Committee in the fulfillment of its mandate, to extend the mandate of the current New York-based Monitoring Team, appointed by the Secretary-General pursuant to paragraph 20 of resolution 1617 (2005), for a further period of 18 months, under the direction of the Committee. . . ." Finally, in paragraph 33 the Security Council decided "to review the measures described in paragraph 1 of this resolution with a

view to their possible further strengthening in 18 months, or sooner if necessary. . . ."

3. Challenges to Sanctions in U.S. Courts

a. Denial of license to renew trademark by Cuban company

On December 21, 2006, the United States moved to dismiss, or in the alternative, for summary judgment on, claims brought against the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, named U.S. officials, and the United States. *Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport ("Cubaexport") v. United States Department of the Treasury, Office of Foreign Assets Control*, Civil Action No. 1:06CV01692(ESH) (D.D.C.). The claims sought to invalidate a decision by OFAC denying an application for a specific license to authorize the payment of a filing fee to renew a trademark in the name of Cubaexport. As described in the memorandum in support of its motion, "Cubaexport asks this Court to second-guess OFAC's decision, based in large part on its claim to fundamental rights under the United States Constitution. This Court should see Cubaexport's challenge for what it truly is—an attempt by the Cuban government to invalidate the foreign policy decisions of the political branches of the United States—and reject Cubaexport's claims."

Excerpts follow setting forth the U.S. arguments that the court lacked jurisdiction over Cubaexport's constitutional claims because (1) as an agent of a foreign state—or even as a Cuban national with no substantial connections with the United States—it lacks rights guaranteed by the Fifth Amendment on which it relied; and (2) even if Cubaexport were protected by the Fifth Amendment, its claims were without merit because it lacked an entitlement or property interest recognized by the Fifth Amendment and, in any event, OFAC's actions in the case comported with constitutional requirements because (a) OFAC provided Cubaexport with

both notice and an opportunity to be heard and (b) the adverse effect of OFAC's actions on entities subject to economic sanctions does not constitute a vested "taking" of private property.

Although not further excerpted here, the U.S. memorandum also refuted Cubaexport's argument that certain OFAC actions were arbitrary and capricious and thus should be set aside under the Administrative Procedure Act ("APA"), stating in the memorandum's introductory paragraphs:

> In light of the extensive deference due OFAC in interpreting its own regulatory authority as well as the deference due the foreign policy judgments of the political branches, OFAC's decision to deny a request for a specific license is not arbitrary or capricious. The decision, which is supported by judicial precedent and the advice of a fellow agency, is entirely consistent with applicable statutes and regulations.

Most footnotes and citations to the complaint and administrative record have been omitted from the excerpts below. The full texts of the following documents are available at *www.state.gov/s/l/c8183.htm*: (1) Defendants' [U.S.] Motion To Dismiss Or, In The Alternative, For Summary Judgment; (2) Statement of Undisputed Facts; (3) Memorandum In Support Of Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, and accompanying declaration of Adam J. Szubin, Director of OFAC; (4) OFAC letters of April 6, 2006 and July 28, 2006; and (5) Memorandum of July 28, 2006, from the Department of State to OFAC. The case was pending at the end of 2006.

---

* * * *

STATUTORY AND REGULATORY BACKGROUND

In response to the expropriation of U.S. property in Cuba and other acts by the Castro regime deemed antagonistic to the interests of this country, President Kennedy imposed an embargo on all

trade with Cuba in February 1962. *See* Proclamation 3447 of February 3, 1962, 27 Fed. Reg. 1085 (1962). The current terms of the embargo and related restrictions are reflected in the [Cuban Assets Control Regulations ("CACR")], *see* 31 C.F.R. Part 515, which were promulgated pursuant to section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. § 1 et seq.

* * * *

ARGUMENT

I. CUBAEXPORT LACKS STANDING TO ASSERT ITS FIFTH AMENDMENT CLAIMS

The Due Process Clause of the Fifth Amendment provides that no "person" shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. However, unlike citizens of the United States, or even "States of the Union," "foreign nations" are "entirely alien to our constitutional system." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). It would therefore be "highly incongruous to afford greater Fifth Amendment rights" to foreign entities than to the states who, despite "help[ing] make up the very fabric of that system," possess no rights as a "person" under the Fifth Amendment. *Id.; see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In accordance with the textual limitations of the Due Process Clause, the judiciary has been reluctant to extend Fifth Amendment protections to foreign states. For example, the Supreme Court has never "suggested that foreign nations enjoy rights derived from the Constitution, or that they can use such rights to shield themselves from adverse actions taken by the United States." *Id.* at 97. Rather than mediating legal disputes between the United States and a foreign nation through the Constitution, "the federal judiciary has relied on principles of comity and international law to protect foreign governments in the American legal system." *Id.* If Fifth Amendment protections were extended to foreign nations, "serious practical problems" might arise:

> For example, the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law. The courts would be

> called upon to adjudicate these sensitive questions, which in turn could tie the hands of the other branches as they sought to respond to foreign policy crises. The Constitution does not command this.

Price, 294 F.3d at 99; *see also People's Mojahedin Org. of Iran v. Dep't of State ("PMOI"),* 182 F.3d 17, 22 (D.C. Cir. 1999) ("No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy."). Based upon these legal and policy considerations, the D.C. Circuit has expressly held that "foreign states are not 'persons' protected by the Fifth Amendment." *Id.* at 96; *see also TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300 (D.C. Cir. 2005).

Thus, the question for this Court is whether the Cuban government exerted "sufficient control over [Cubaexport] to make it an agent of the state" for Fifth Amendment purposes. *TMR Energy*, 411 F.3d at 301; *see also First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 629 (1983). If so, then "there is no reason to extend to [Cubaexport] a constitutional right that is denied to the sovereign itself." *TMR Energy*, 411 F.3d at 301. In the present case, it is clear from the pleadings and judicial precedent that Cubaexport is an agent of the Cuban government.

Cubaexport describes itself in its Complaint as a "Cuban state-owned enterprise" located solely within Cuba. Moreover, Cubaexport states that it "was established in 1965 by the Cuban Ministry of Foreign Commerce for the purpose of exporting food and other products." Accordingly, Cubaexport acknowledges that it is a state-owned entity created by the Cuban government for the purpose of executing state trade policy. . . .

In line with this acknowledgment, other courts have found Cubaexport to be a "wholly owned corporation[] of the Government of Cuba." *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 357 (11th Cir. 1984); *see also HCH V*, 203 F.3d at 120. . . . And at least one court that has engaged in this agency analysis under the Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, 116 Stat. 2322, has recently held that Cubaexport is an agent of the Cuban government. *See Weininger v. Castro*, — F. Supp.2d —, 2006

WL 3343131, at *33 (S.D.N.Y. Nov. 17, 2006). . . . Accordingly, as an agent of the Cuban government, Cubaexport lacks status as a "person" protected by the guarantees of the Fifth Amendment. . . .

However, even if Cubaexport is determined to have a separate juridical status from the government of Cuba, it is "far from obvious that even an independent [Cubaexport] would be entitled to the protection of the Fifth Amendment." *TMR Energy*, 411 F.3d at 302 n. This doubt arises from the fact that "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). The main exception to this rule applies when aliens "'have come within the territory of the United States and developed substantial connections with this country.'" *PMOI*, 182 F.3d at 22 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)); . . .

Cubaexport is a non-resident corporation operating out of Cuba. Any activities that Cubaexport wishes to conduct within the United States are strictly regulated, if not expressly prohibited, by the CACR. See 31 C.F.R. Part 515. Accordingly, Cubaexport's ability to establish a presence within the United States is, for all practical purposes, restricted by federal law. In the present case, the only contact alleged by Cubaexport is the registration of a trademark, through counsel, in the United States PTO, and the defense of that trademark through litigation by counsel within the United States. If such minimal presence is sufficient to [entitle] a foreign entity to the protections of the Fifth Amendment, despite the existence of sanctions against that entity that statutorily limit the entity's presence, then it is unclear what force the "substantial connections" limitation maintains. *See PMOI*, 182 F.3d at 22.

II. EVEN ASSUMING CUBAEXPORT HAS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT, ITS DUE PROCESS CLAIM LACKS MERIT

* * * *

A. OFAC's Actions Were Consistent with Procedural Due Process

In order to establish a violation of procedural due process, Cubaexport must establish the existence of a protected property

interest as well as a violation of the procedural protections that were due. *See, e.g., Orange v. Dist. of Columbia*, 59 F.3d 1267, 1273 (D.C. Cir. 1995). In the present case, Cubaexport's unilateral expectation of a license from OFAC to permit transactions related to the renewal of the Havana Club trademark does not constitute a property interest protected by the Fifth Amendment. However, the Court need not decide this issue, as it is apparent that OFAC provided Cubaexport with notice and a meaningful opportunity to be heard on its application for a specific license.

1. Cubaexport Lacks a Property Interest in a Specific License Authorizing Transactions Related to Renewal of the Havana Club Trademark

The Supreme Court has explained that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The extent of this protected interest is defined, not by the Constitution, but instead by statutes that establish a legitimate claim of entitlement to the benefit. *Id.*

Cubaexport maintains that it has a vested property interest in the registration of the Havana Club mark. OFAC does not dispute that a property interest could exist in a trademark. See generally *Coll. Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). However, as will be discussed infra in Section III, OFAC did not appropriate the Havana Club trademark from Cubaexport or retroactively negate a prior registration of the trademark. Rather, OFAC declined to grant Cubaexport a license for transactions related to renewal of the trademark with the PTO. This is an important distinction, as it narrows the due process inquiry to whether Cubaexport had a Fifth Amendment property interest in the grant of such a license.

Because a property interest recognized by the Fifth Amendment requires a claim of entitlement, rather than a unilateral expectation, a property interest does not exist "when a statute leaves a benefit to the discretion of a government official." *Bloch v. Powell*, 348 F.3d 1060, 1069 (D.C. Cir. 2003). . . . This inquiry is particularly

appropriate when attempting to determine whether a statute creates an entitlement in the renewal of a government license. . . .

Unlike the average applicant for registration or renewal of a trademark before the [U.S. Patent and Trademark Office ("PTO")], Cubaexport's expectation was expressly conditioned on the licensing provisions of the CACR. *See* 31 C.F.R. § 515.527. Prior to 1998, that authorization was granted by a general license authorizing such transactions. *See id*. § 515.527(a)(1). However, Congress's passage of section 211 further conditioned the ability of a Cuban entity to register or renew on whether the trademark is the same as or substantially similar to a trademark used in connection with property that had been confiscated. *Id*. § 515.527(a)(2). Congress did not list in section 211 extensive, mandatory procedures for making a specific licensing determination under section 515.527, opting instead to qualify the existing general license. Pub. L. No. 105-277, § 211, 112 Stat. 2681, 2681-88.

In situations where the general licensing provision no longer applied, the ability to engage in transactions related to the registration or renewal of a trademark would be prohibited absent the grant of a specific license by OFAC. *See* 31 C.F.R. § 515.318; *see also* Szubin Decl. ¶ 22. OFAC is given wide discretion to make this determination. . . . Moreover, this determination is made expressly revocable by regulation. *See* 31 C.F.R. § 501.803. . . . Accordingly, whatever interest Cubaexport has in obtaining a license from OFAC is constrained to such an extent that it could not constitute an "entitlement" protected by the Due Process Clause.

2. OFAC Provided Cubaexport with All of the Process It Was Allegedly Due

Even assuming that Cubaexport's ability to obtain a license was a property interest recognized by the Fifth Amendment, OFAC provided Cubaexport with all of the process it was due in making the licensing determination. The Due Process Clause of the Fifth Amendment generally requires the government to afford notice and a meaningful opportunity to be heard before depriving a person of a recognized property interest. *See, e.g., Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003). . . . In the context of OFAC's enforcement authority under

TWEA and IEEPA, courts have held that this opportunity does not entail a full hearing prior to agency action; an opportunity for an affected entity to respond to OFAC in writing is sufficient to satisfy due process. *See Holy Land Found*., 333 F.3d at 163-64; *Nat'l Council of Resistance of Iran v. Dep't of State* ("NCRI"), 251 F.3d 192, 209 (D.C. Cir. 2001). . . . In fact, courts have recognized that OFAC's need for prompt action in the context of TWEA or IEEPA has justified the absence of pre-deprivation notice or an opportunity to be heard, even in instances in which an organization is effectively shut down by OFAC's actions. *See, e.g., Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp.2d 34, 49 (D. D.C. 2005); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp.2d 57, 76 (D. D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

Nevertheless, OFAC provided Cubaexport both notice and an opportunity to be heard prior to acting on the application for a license authorizing transactions relating to the renewal of the Havana Club mark. . . .

* * * *

III. EVEN ASSUMING CUBAEXPORT HAS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AMENDMENT, ITS TAKINGS CLAIM LACKS MERIT

In Count III of the Complaint, the plaintiff alleges that section 211 and 31 C.F.R. § 515.527, on their face or as applied by OFAC, constitute a "regulatory taking" of Cubaexport's property for which Cubaexport received no compensation. As an initial matter, it is doubtful that this is the appropriate forum for such a claim. Except for cases in which the amount in controversy is less than $10,000, the Tucker Act, 28 U.S.C. § 1491(a); *see also* 28 U.S.C. § 1346(a)(2), provides for exclusive jurisdiction in the United States Court of Federal Claims. . . .

Even if this Court has concurrent jurisdiction over Cubaexport's takings claim, the claim is without merit. Courts have consistently rejected such claims in the economic sanctions context. *See, e.g., Paradissiotis v. United States*, 304 F.3d 1271, 1274 (Fed. Cir. 2002). . . . The fundamental basis for these decisions was first set forth by the Supreme Court and has been repeated frequently in

the sanctions context despite the subsequent evolution of takings jurisprudence:

> A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [W]as it ever imagined this was taking private property without compensation or without due process of law?

E.g. Paradissiotis, 304 F.3d at 1274; *Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (quoting *Legal Tender Cases (Knox v. Lee)*, 79 U.S. 457, 551 (1870)). After all, "[e]conomic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them." *Paradissiotis*, 304 F.3d at 1275. Consequently, relying upon the broad executive authority conferred by IEEPA and TWEA, courts have recognized that a complete blocking of an entity's assets does not represent a taking because, inter alia, such sanctions are temporary and do not "vest" property in the United States. *See, e.g., Nielsen v. Sec'y of Treasury*, 424 F.2d 833, 844 (D.C. Cir. 1970); *see also Propper v. Clark*, 337 U.S. 472, 481-82 (1949); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981); *Islamic Am. Relief Agency*, 394 F. Supp.2d at 51; *Holy Land Found.*, 219 F. Supp.2d at 78; *Global Relief Found.*, 207 F. Supp.2d at 802. This reasoning has been extended even to those actions by OFAC that have had the effect of reducing or eliminating the value of blocked property. *See Paradissiotis*, 304 F.3d at 1275-76; *see also Nielsen*, 424 F.2d at 843. In denying a specific license to Cubaexport, a Cuban entity, OFAC did not vest any property in the United States government. Nor did OFAC's denial prohibit all economically viable uses of the trademark, as the trademark could still be used in Cuba or other countries where the mark has been recognized. Instead, OFAC's action had, at most, the effect of preventing Cubaexport from renewing recognition of the mark in the United States, a transaction that would otherwise

be prohibited in the absence of governmental authorization. *See, e.g.*, 31 C.F.R. § 515.201(b); see also 31 C.F.R. § 501.803 ("[L]icenses (whether general or specific) . . . may be amended, modified or revoked at any time."). The denial of such a limited expectation by an entity already the target of foreign sanctions could not be deemed a taking in violation of the Fifth Amendment. *See Paradissiotis*, 304 F.3d at 1275; *see also Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981). . . .

* * * *

b. Sanctions on travel to Iraq implementing UN Security Council resolution

On October 10, 2006, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court decision upholding U.S. sanctions on travel to Iraq promulgated following Iraq's invasion of Kuwait in 1990. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006). As explained by the court:

> In an effort to draw attention to the effect of the sanctions [requiring a license for certain humanitarian commodities], Sacks and other[s] traveled to Iraq repeatedly while the sanctions were in effect, bringing with them medicine and medical supplies for which they had failed to procure an export license. They did so in knowing violation of the United States regulations prohibiting travel and the sending of unlicensed humanitarian donations to Iraq. Sacks has been assessed a penalty by the federal government for one violation arising from these trips, and he seeks relief from enforcement of that penalty.

Sacks also challenged the sanctions on medicine and medical supplies but, since no penalty had been imposed on him for violation of those provisions, the court found he lacked standing to do so and did not address his challenge on that issue. Finally, the court affirmed the lower court's holding that the OFAC regulation in effect at the time prohibited the

government from referring Sacks' unpaid penalty to a private collection agency. Excerpts follow from the court's analysis of the President's authority to impose travel sanctions.

---

* * * *

To place this case in context, it is necessary to review the history of the Iraqi sanctions regime. On August 2, 1990, one day after Saddam Hussein's armies invaded Kuwait, President George H.W. Bush issued Executive Order 12,722, which declared a national emergency and imposed sweeping prohibitions on numerous economic and social transactions with Iraq. 55 Fed. Reg. 31,803 (Aug. 2, 1990). Four days later, the United Nations Security Council passed Resolution 661, which called on all Member States to prevent their nationals from engaging in economic and financial transactions with Iraq except for humanitarian donations of food and medical supplies. . . . Following passage of this resolution, President Bush replaced the earlier Executive Order with Executive Order 12,724, a more thorough and detailed set of sanctions, which likewise included an exception for humanitarian donations of food and medicine. . . .

A month after its initial resolution on Iraq, the United Nations Security Council . . . passed a new resolution recommending, among other steps to be taken, "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666, P8, U.N. Doc. S/RES/666 (Sept. 13, 1990). . . .

In January 1991, OFAC, an agency within the Department of Treasury responsible for coordinating international sanctions, published a final rule in the Federal Register establishing the Iraqi Sanctions Regulations (the Iraqi Sanctions). 56 Fed. Reg. 2112-01 (Jan. 18, 1991)(codified at 31 C.F.R. §§ 575.101 *et seq*.) These regulations included . . . 31 C.F.R. § 575.207, which prohibited all United States persons from conducting "any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities . . . within Iraq except for journalists, United States or United Nations officials, and those assisting American citizens

or permanent residents to flee Iraq (the Travel Ban) and 31 C.F.R. § 575.205, which banned the export of goods, services, and technology to Iraq but retained an exception for "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has been specifically licensed" (the Medicine Restrictions). OFAC also established a licensing program to enable humanitarian donations of food and medical supplies, *id.* §§ 575.501, 575.520, 575.521, *repealed by* 68 Fed. Reg. 61,362, 61,363 (Oct. 28, 2003), and a process for assessing penalties against those who violated the sanctions, *id.* §§ 575.701-705. The Iraqi Sanctions remained in place until, soon after the American-led invasion of Iraq in 2003, the United Nations lifted all non-weapons trade restrictions against Iraq, S.C. Res. 1483, P10, U.N. Doc. S/RES/1483 (May 22, 2003), and OFAC issued a general license permitting all Iraq-related transactions that previously had been prohibited, including unlicensed humanitarian donations, 68 Fed. Reg. 38,188, 38,189 (June 27, 2003)(codified at 31 C.F.R. § 575.533).

* * * *

Sacks does not challenge OFAC's basic authority to restrict travel to Iraq at the President's direction under the United Nations Participation Act (UNPA). *See* 22 U.S.C. § 287c(a) (allowing the President to prohibit rail, sea, and air "communication" with another country in order to comply with United Nations directives); *Karpova v. Snow*, 402 F. Supp. 2d 459, 469 (S.D.N.Y. 2005) (holding that the Iraq Travel Ban is duly authorized by the UNPA). Instead, he alleges that the Travel Ban regulation, 31 C.F.R. § 575.207, exceeded the President's statutory authority because it indirectly regulated the donation of humanitarian medical supplies, something Sacks contends the International Emergency Economic Powers Act (IEEPA) forbids the President from doing. Because the IEEPA imposes no such burden on the President's powers when he acts under the UNPA, we reject this argument.

The IEEPA grants the President authority to unilaterally impose regulations on economic transactions between the United States or its nationals, and foreign countries or their nationals. 50 U.S.C. § 1702(a)(1). To trigger this authority, the President must declare

a "national emergency" necessitated by an "unusual and extraordinary threat." *Id*. § 1701. However, the President's power under the IEEPA is constrained: It "does not include the authority to regulate or prohibit, directly or indirectly . . . donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing and medicine, intended to be used to relieve human suffering," unless the President determines that such donations would seriously impair his ability to address the emergency or would endanger the safety of American combat forces engaged in hostilities. *Id*. § 1702(b)(2). The President, acting under the IEEPA, is also precluded from regulating the export of postal, telegraphic, telephonic and personal communications; information or informational materials, including magazines, photographs, and artwork; and travel to or from a country. *Id*. § 1702(b).

As the district court recognized, however, the IEEPA is not the lone source of the President's power to enact economic sanctions. Executive Order 12,724, which instructed the Treasury Secretary or his designate (OFAC) to promulgate regulations enforcing the economic sanctions against Iraq, derived its power from both the IEEPA and the UNPA. 55 Fed. Reg. 33,089 (Aug. 9, 1990). OFAC contends that Congress did not intend the IEEPA's limits to interfere with the President's authority under the UNPA. Our review of the structure and plain language of the two statutes convinces us that OFAC is correct.

The economic restrictions authorized by the IEEPA (and the related limits on that authority) are confined to a particular circumstance: the declared national emergency. . . . By contrast, the UNPA allows the President to impose sanctions that are more wide-ranging, without any built-in congressional review and "[n]otwithstanding the provisions of any other law." 22 U.S.C. § 287c. When called upon to enforce a Security Council directive, the UNPA authorizes the President:

> to the extent necessary to apply such measures . . . [to] investigate, regulate or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio and other means of communication between any foreign

> country or national thereof . . . and the United States or any person subject to the jurisdiction thereof.

Id. The UNPA thus authorizes the President to take measures when enforcing a Security Council resolution, such as limiting postal communication and air travel, that he could not take independently by declaring a national emergency. . . .

We refuse to read Congress's passage of the IEEPA as repealing key provisions of the UNPA. . . .

* * * *

Therefore, the district court correctly held that the medical supplies exception to presidential power embodied in the IEEPA did not limit the President's ability to ban travel to and within Iraq pursuant to the UNPA.

* * * *

Cross References

Terrorism sanctions, **Chapter 3.B.1.c, d, e.**
Counternarcotics sanctions, **Chapter 3.B.3.**
Trafficking in persons-related sanctions, **Chapter 3.B.4.**
Money laundering sanctions, **Chapter 3.B.7.**
International Criminal Court-related sanctions, **Chapter 3.C.2.**
Nonproliferation sanctions, **Chapter 18.C.2. a.,b. and 4.b., c.**

16-Cummins-Chap16.indd 1020 10/22/07 11:48:22 PM

Chapter 17

International Conflict Resolution and Avoidance

A. PEACE PROCESS AND RELATED ISSUES

1. Peaceful Settlement of Disputes: International Court of Justice

On May 11, 2006, Department of State Legal Adviser John B. Bellinger, III, participated in a conference entitled "International Courts and Tribunals and the Rule of Law," held at the George Washington University School of Law. Mr. Bellinger noted that "it should be uncontroversial that the United States is among the world's leaders in supporting the development of international courts and tribunals." He continued:

> Our general approach to international courts and tribunals is pragmatic. In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes. Consistent with this approach, we evaluate the contributions that proposed international courts and tribunals may make on a case-by-case basis, just as we consider the advantages and disadvantages of addressing particular matters through international judicial mechanism rather than diplomatic or other means.

Further excerpts below address U.S. views on the role of the International Court of Justice. The full text of Mr. Bellinger's remarks is available at *www.state.gov/s/l/c8183.htm; see also*

17-Cummins-Chap17.indd 1021 10/22/07 11:48:53 PM

Chapter 3.C.1. for excerpts concerning international criminal tribunals.

---

* * * *

Tribunals for the resolution of traditional state-to-state disputes have historically played a useful role in providing a neutral, depoliticized forum for resolving disputes between states that are difficult to resolve through regular diplomatic means. Sometimes this is because they involve contested facts and complicated legal issues, which can best be evaluated and resolved through a judicial process. In other cases, a large number of claims between states, often involving treatment of each others' nationals, may prove too complicated or time consuming for states to resolve diplomatically and an international tribunal may prove helpful in easing this burden. In still other cases, states may find it politically difficult to compromise on matters in dispute but can use a third-party decision-making mechanism to overcome the diplomatic impasse.

The most prominent Court in this category, the International Court of Justice, celebrated its 60th anniversary last month and the Office of the Legal Adviser and our Embassy participated in events in The Hague commemorating that important milestone. The United States has long supported the ICJ and has appeared before it in a significant number of cases. We have worked hard to maintain a seat for a judge from the United States, and were extremely pleased last November when Judge Thomas Buergenthal was reelected to the Court . . . .

The United States has affirmatively looked to the ICJ in the past as a neutral forum to facilitate the resolution of disputes. In the wake of the seizure of the U.S. Embassy in Tehran, we looked to the Court to help enforce our rights under the Vienna Conventions on Diplomatic and Consular Relations. In the early 1980s, we agreed to submit to the ICJ a dispute with Canada over the maritime boundary in the Gulf of Maine. And later, in the 1980s, we agreed with Italy to submit the ELSI case to the Court, inviting it to resolve a dispute arising under the U.S.-Italy Friendship Commerce and Navigation Treaty.

Our more recent experience before the Court has been in more politically charged cases that were not submitted by agreement. In the Oil Platforms case, Iran sought to use a friendship, commerce and navigation treaty to challenge U.S. efforts to protect neutral shipping in the Persian Gulf from Iranian attacks. In the Lockerbie case, Libya sought to use an aviation terrorism convention to challenge the authority of the UN Security Council to impose sanctions for Libya's failure to cooperate in efforts to bring to justice those responsible for the bombing of Pan Am flight 103. In a series of cases against NATO members, Serbia invoked the Genocide Convention in connection with NATO's actions to end atrocities in Kosovo. In the *Breard*, *LaGrand*, and *Avena* cases, implementation of the death penalty by the United States was challenged under the Vienna Convention on Consular Relations; even if those latter cases are not viewed as "political," they unquestionably invited the Court into a complex area beyond its expertise, namely the domestic criminal justice system. And requests for advisory opinions from the Court on issues related to the Israeli-Palestinian conflict and the legality of nuclear weapons invited the Court into highly charged, fluid political disputes.

The use of the Court for such political matters carries risks. In the long run, the willingness of states to refer disputes to the Court depends on their confidence in its objectivity and impartiality and their sense that the court is an appropriate forum for resolution of the dispute in question. Where the Court addresses sensitive political issues, there is a risk that its decisions may be viewed as reflecting the Court's desired political outcomes rather than its dispassionate analysis of the facts and the law. Similarly if the Court is asked to address issues that require expertise it does not have and cannot acquire, there is a substantial risk of decisions that simply don't make sense.

Of course, the Court does not control the types of cases that states choose to put before it. In this regard, states themselves must consider carefully the impact of the increasing referral of political matters on the Court's long-term institutional role.

As one example in this regard, the United States opposed the decision of the UN General Assembly in 2003 to seek an advisory opinion from the Court on matters related to the Israeli

security barrier. We were concerned that the Court's involvement in these issues risked interfering with the agreed framework for direct negotiations between the Israelis and Palestinians to resolve the issues between them and risked politicizing the Court. We were also concerned that the Court's advisory opinion procedures were ill suited to accommodate a matter as factually complex as the one referred by the General Assembly, particularly without the full participation of the interested parties.

We believe that these concerns were largely borne out in the advisory opinion rendered by the Court. In practice, the opinion has made little meaningful contribution to efforts to resolve issues between the Israelis and Palestinians. Also, the Court's opinion is open to criticism on its treatment of both factual and legal issues, in some cases due more to process than to any fault on the part of the Court. For example, the fact that the General Assembly had already declared itself on many of the issues, risks creating the impression that the Court was being used to advance a particular set of political claims.

Also of concern are efforts in some quarters to suggest that aspects of the Court's advisory opinion, such as that relating to the extraterritorial application of the International Covenant on Civil and Political Rights, have binding force on member states in contexts that go beyond those addressed in the advisory opinion. This of course, is not the case. Under the ICJ statute, states are bound only by the decisions—and not by the Court's reasoning underlying those decisions—in contentious cases to which they are parties, and advisory opinions have no binding force at all, but rather serve to provide guidance on legal questions to the UN organ or specialized agency requesting them.

For this range of reasons, we hope that the General Assembly's decision to seek an advisory opinion in this case does not reflect an increased desire to use the Court's advisory opinion jurisdiction in similar cases in the future, since doing so would risk damaging the Court's credibility.

While the Court does not control the matters referred to it, there are steps the Court can and should take to avoid assuming a role that calls into question its objectivity and non-political character. In the Israeli security barrier case, for example, the Court

could have declined to render an advisory opinion, on the ground that the General Assembly's request was essentially a request that the Court adjudicate a contentious case without the consent of the affected parties rather than a bona fide request for an advisory opinion.

The Court's handling of the Oil Platforms case in 2003 is another example where, in our view, the Court should have taken steps to avoid suggestions that it sought to play a political role. In that case, the Court dismissed on the merits Iran's claim against the United States because Iran failed to meet its affirmative burden of showing that U.S. actions against Iran's platforms had affected commerce protected under the U.S.-Iran Treaty of Amity. Yet, in spite of this conclusion, the Court went on to express views on, and indeed purported to decide, contentious issues concerning the law on the use of force that were unnecessary to its ultimate judgment.

The Court's treatment of these issues suggested a desire on its part to influence political decisions on matters wholly unrelated to the case before it—specifically, on questions then being considered relating to the use of force in Iraq. One member of the Court, in a separate opinion, defended the Court's decision to address the use of force issues, indicating that in light of the contemporary debate about the law relating to the use of military force, when "supplied" with a case allowing it to do so, the Court ought to take every opportunity to participate in that debate.

This simply is not a wise approach for the Court. States cannot have confidence in the objectivity of a tribunal if they fear its decisions will be motivated by the judges' agendas rather than by an objective and judicious analysis of the relevant facts and law. Judges must realize that whether they are "supplied" by states with like cases in the future depends on their ability to excel in a more traditional judicial role, and that stepping outside that role may harm not only their own reputation but also the reputation of international tribunals in general.

Having stated this concern, I want to emphasize that an effective International Court of Justice serves our interests in advancing the rule of law and encouraging the peaceful resolution of disputes between states. This does not mean that we think the Court will be

the best forum for resolving every dispute that may arise between states. In this regard, it is well known that the United States withdrew from the compulsory jurisdiction of the Court in 1984. This is consistent with our preference for assessing the suitability of particular disputes for resolution before the Court on a case by case basis. Moreover, we are not alone in taking this approach; indeed, only 65 states have accepted the Court's compulsory jurisdiction and many of those have done so subject to reservations. We have also recently withdrawn from the Additional Protocol to the Vienna Convention on Consular Relations which provides for ICJ jurisdiction over disputes under that Convention. We did so because the Court's recent decisions in cases under the Vienna Convention provided for remedies that went well beyond those contemplated by the United States when it became party to that Convention, and in our view inappropriately interfered in our domestic criminal proceedings. In our view, disputes over the particular means of compliance with obligations under the Vienna Convention are more appropriately a matter for states to resolve through diplomatic means.

We will continue, however, to support the Court's role as a neutral, depoliticized forum for resolving disputes among states in appropriate cases. President Bush's recent determination that the United States will comply with the *Avena* decision in spite of our continuing disagreement with both the Court's outcome and its reasoning demonstrates the depth of our respect for the Court's role and its judgments. As the Court enters its next 60 years, we look forward to working with the Court, including its new President, Judge Rosalyn Higgins, and with others in the international community to foster its effectiveness.

* * * *

2. Israel and the Palestinian Authority

a. President's address to UN General Assembly

In his annual speech to the UN General Assembly on September 19, 2006, President Bush addressed conflict in a

number of countries. The President's remarks as to Israel and the Palestinian Authority are excerpted below. The full text of President Bush's speech is available at 42 WEEKLY COMP. PRES. DOC. 1633 (Sept. 25, 2006).

---

* * * *

The world must also stand up for peace in the Holy Land. I'm committed to two democratic states—Israel and Palestine—living side-by-side in peace and security. I'm committed to a Palestinian state that has territorial integrity and will live peacefully with the Jewish state of Israel. This is the vision set forth in the road map—and helping the parties reach this goal is one of the great objectives of my presidency. The Palestinian people have suffered from decades of corruption and violence and the daily humiliation of occupation. Israeli citizens have endured brutal acts of terrorism and constant fear of attack since the birth of their nation. Many brave men and women have made the commitment to peace. Yet extremists in the region are stirring up hatred and trying to prevent these moderate voices from prevailing.

This struggle is unfolding in the Palestinian territories. Earlier this year, the Palestinian people voted in a free election. The leaders of Hamas campaigned on a platform of ending corruption and improving the lives of the Palestinian people, and they prevailed. The world is waiting to see whether the Hamas government will follow through on its promises, or pursue an extremist agenda. And the world has sent a clear message to the leaders of Hamas: Serve the interests of the Palestinian people. Abandon terror, recognize Israel's right to exist, honor agreements, and work for peace.

President Abbas is committed to peace, and to his people's aspirations for a state of their own. Prime Minister Olmert is committed to peace, and has said he intends to meet with President Abbas to make real progress on the outstanding issues between them. I believe peace can be achieved, and that a democratic Palestinian state is possible. I hear from leaders in the region who want to help. I've directed Secretary of State Rice to lead a diplomatic effort to engage moderate leaders across the region, to help the Palestinians reform their security services, and support

Israeli and Palestinian leaders in their efforts to come together to resolve their differences. Prime Minister Blair has indicated that his country will work with partners in Europe to help strengthen the governing institutions of the Palestinian administration. We welcome his initiative. Countries like Saudi Arabia and Jordan and Egypt have made clear they're willing to contribute the diplomatic and financial assistance necessary to help these efforts succeed. I'm optimistic that by supporting the forces of democracy and moderation, we can help Israelis and Palestinians build a more hopeful future and achieve the peace in a Holy Land we all want.

* * * *

b. Palestinian Authority Legislative Council elections

In Palestinian Authority Legislative Council ("PLC") elections held January 26, 2006, Hamas won a majority of seats, resulting in a Hamas-led Palestinian Authority government. Hamas has long been designated a terrorist organization in the United States and elsewhere and is subject to a number of terrorism-related sanctions in the United States. Secretary of State Condoleezza Rice responded to a question from a reporter on January 29, 2006, concerning the financial needs of the Palestinian Authority, stating that "the United States is not prepared to fund an organization that advocates the destruction of Israel, that advocates violence and that refuses its obligations under the roadmap to which everyone is committed. We do understand that the Palestinian people may have some humanitarian needs and I think we will have to look at that on a . . . case-by-case basis . . . but we are going to review all of our assistance programs [and] the bedrock principle here is we can't have funding for an organization that holds those views just because it is in government." *See www.state.gov/secretary/rm/2006/60016.htm.*

On January 30, representatives of the Quartet (UN Secretary General Kofi Annan, U.S. Secretary of State Condoleezza Rice, Russian Foreign Minister Sergei Lavrov, Austrian Foreign Minister Ursula Plassnik, High Representative for European

Common Foreign and Security Policy Javier Solana, and European Commissioner for External Relations Benita Ferrero-Waldner) met in London and issued a statement on the elections, excerpted below. The full text of the January 30 Quartet statement is available at *www.state.gov/r/pa/prs/ps/2006/60068.htm*.

The Quartet congratulated the Palestinian people on an electoral process that was free, fair and secure. The Quartet believes that the Palestinian people have the right to expect that a new government will address their aspirations for peace and statehood, and it welcomed President Abbas' affirmation that the Palestinian Authority is committed to the Roadmap, previous agreements and obligations between the parties, and a negotiated two-state solution to the Israeli-Palestinian conflict. It is the view of the Quartet that all members of a future Palestinian government must be committed to nonviolence, recognition of Israel, and acceptance of previous agreements and obligations, including the Roadmap. We urge both parties to respect their existing agreements, including on movement and access.

* * * *

Mindful of the needs of the Palestinian people, the Quartet discussed the issue of assistance to the Palestinian Authority. First, the Quartet expressed its concern over the fiscal situation of the Palestinian Authority and urged measures to facilitate the work of the caretaker government to stabilize public finances, taking into consideration established fiscal accountability and reform benchmarks. Second, the Quartet concluded that it was inevitable that future assistance to any new government would be reviewed by donors against that government's commitment to the principles of nonviolence, recognition of Israel, and acceptance of previous agreements and obligations, including the Roadmap.

The Quartet calls upon the newly elected PLC to support the formation of a government committed to these principles as well as the rule of law, tolerance, reform and sound fiscal management. Both parties are reminded of their obligations under the Roadmap to avoid unilateral actions which prejudice final status issues.

The Quartet reiterated its view that settlement expansion must stop, reiterated its concern regarding the route of the barrier, and noted Acting Prime Minister Olmert's recent statements that Israel will continue the process of removing unauthorized outposts.

The Quartet expressed its concern for the health of Prime Minister Sharon and its hope for his rapid recovery.

The Quartet reiterated its commitment to the principles outlined in the Roadmap and previous statements, and reaffirmed its commitment to a just, comprehensive, and lasting settlement to the Arab-Israeli conflict based upon U.N. Security Council Resolutions 242 and 338. The Quartet will remain seized of the matter and will engage key regional actors.

> The new government, which included a Hamas Prime Minister, took office on March 29, 2006. The United States joined in a Quartet statement of March 30, 2006, recalling its call for the new government "to commit to the principles of nonviolence, recognition of Israel, and acceptance of previous agreements and obligations, including the Roadmap," and "noted with grave concern that the new government has not committed" to these principles. The full text of the Quartet statement is available at *www.state.gov/p/nea/rls/63910.htm*.
>
> On May 9, 2006, the United States joined in a further Quartet Statement addressing means of delivering humanitarian assistance to the Palestinian people, and expressing its willingness
>
> > to endorse a temporary international mechanism that is limited in scope and duration, operates with full transparency and accountability, and ensures direct delivery of assistance to the Palestinian people. . . . The Quartet welcomed the offer of the European Union to develop and propose such a mechanism. It invites other donors and international organizations to consider participation in such a mechanism. It urged Israel in parallel to take steps to improve the humanitarian situation of the Palestinian people. The Quartet reiterates that the Palestinian Authority government must fulfill its responsibilities with respect to basic human needs, including health services,

as well as for proper fiscal management and provision of services.

The Quartet endorsed an EU proposal for a temporary international mechanism in a statement of June 17, 2006, available at *www.state.gov/r/pa/prs/ps/2006/68003.htm*. The mechanism was established and work began in Jerusalem in late June. *See* European Community fact sheet *http://ec.europa.eu/external_relations/gaza/docs/06_1006_tim_fact_sheet.pdf*.

On December 14, 2006, Christopher Ross, U.S. Senior Advisor, explained the U.S. abstention on General Assembly Resolution 61/135, "Assistance to the Palestinian People." The full text of Mr. Ross's statement, excerpted below, is available at *www.un.int/usa/06_401.htm*.

---

* * * *

I must emphasize that the United States shares the concern of the international community regarding the hardships facing the Palestinian people. The Arab world and the Palestinian people in particular are aware of the United States' significant continuing assistance to the Palestinian people for basic human needs and civil society and private sector development.

Through its substantial financial contribution to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the United States has consistently demonstrated its support for humanitarian relief efforts for Palestinian refugees.

* * * *

Nonetheless, the United States cannot support this particular resolution because it fails to include language on the need for the Palestinian Authority Government to accept the three Quartet principles: renunciation of violence and terror, recognition of Israel, and acceptance of previous agreements and obligations, including the Road Map.

Although the resolution properly welcomes the role presently played by the Temporary International Mechanism in assisting the

Palestinian people, it regrettably fails to note that this mechanism was created as a specific consequence of the failure of the Hamas-led Palestinian Authority Government to commit itself to the Quartet principles.

This being so, any resolution must make explicit reference to both the Temporary International Mechanism and the Quartet principles. It should also encourage the provision of assistance via United Nations agencies, other international organizations, and the Quartet-approved Temporary International Mechanism.

* * * *

On May 10, 2006 the Office of Foreign Assets Control, Department of the Treasury, amended applicable regulations to authorize certain transactions that would otherwise be barred by the role of Hamas in the PA. 71 Fed. Reg. 27,199 (May 10, 2006). *See* discussion in Chapter 16.A.7.

c. Outbreak of renewed hostilities

On June 25, 2006, Hamas abducted an Israeli corporal and launched rocket attacks from Gaza into Southern Israel. Israel responded with attacks on Gaza. The armed conflict resulting from these actions continued until a cease-fire was agreed on November 26, 2006.

On several occasions in 2006 the United States voted against resolutions in various UN bodies involving the conflict because it viewed them as one-sided and as unhelpful in efforts to move toward peace in the Middle East. Examples follow.

(1) Security Council

As discussed in Chapter 18.A.7, during 2006 the United States vetoed two Security Council resolutions addressing the outbreak of violence between Israel and Hamas on June 25, stating in both cases that the resolutions were flawed in their allocation of responsibility in the conflict.

Statements by Ambassador Bolton also stressed that the resolutions would have a negative effect on the ongoing peace process. On July 13, 2006, Ambassador Bolton stated:

> . . . The draft Resolution before the Council was unbalanced. It placed demands on one side in the Middle East conflict but not the other. This draft Resolution would have exacerbated tensions in the region and would have undermined our vision of two democratic states, Israel and Palestine, living side-by-side in peace and security.
>
> Passage would also have undermined the credibility of the Security Council, which itself must be seen by both sides as an honest broker in the Middle East conflict. In this regard, public statements of UN officials must also accurately reflect positions agreed by member governments.

See www.un.int/usa/06_165.htm.

In his explanation of a second U.S. veto on November 11, 2006, Ambassador Bolton stated that the United States was "disturbed at language in the resolution that is, in many places, biased against Israel and politically motivated. Such language does not further the cause of peace, and its unacceptability to the United States in previous resolutions [is] well-known." *See www.un.int/usa/06_328.htm; see also* statement by Ambassador Bolton to the Security council on November 9, available at *www.un.int/usa/06_323.htm.*

(2) UN General Assembly

In the UN General Assembly Second Committee on November 10, 2006, Alec Mally, U.S. Counselor, explained the U.S. vote against a draft resolution, "Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan over their Natural Resources." The full text, excerpted below, is available at *www.un.int/usa/06_326.htm.*

The United States has long supported the humanitarian needs and legitimate aspirations of the Palestinian [p]eople. President Bush has articulated clearly that the U.S. objective is two sovereign, democratic states, Israel and Palestine, living side-by-side in peace and security. Through its failure to renounce terror, recognize Israel, and respect previous agreements, the Palestinian Authority Government's policies continue to create hardships for the Palestinian people and to postpone opportunities to reinvigorate the roadmap and progress toward the two-state goal. President Abbas, by contrast, remains committed to these principles and his platform of peace.

The United States cannot support the resolution just adopted because it improperly involves the General Assembly in issues that must be resolved by the parties themselves in permanent status negotiations.

The resolution's language is one-sided and unbalanced, placing demands on one party to the conflict without recognizing the obligations of the other parties. There is a role for the UN in this issue but that role is in supporting the two parties to the conflict. The United Nations plays a key role as a member of the Quartet (U.S., EU, UN, Russia). Resolutions such as these undermine the credibility of the UN, which must be seen by both sides as an honest broker in the conflict.

* * * *

3. Israel and Lebanon

On July 12, 2006, Hezbollah forces seized two Israeli soldiers in Israel and transported them to Lebanon; Israel responded with air strikes against suspected Hezbollah targets in Lebanon. The outbreak of armed conflict is discussed in Chapter 18.A.6. On August 11, 2006, the UN Security Council adopted Resolution 1701, which was co-sponsored by the United States. In preambular paragraph 11 and operative paragraph 1 the Security Council,

> *Determining* that the situation in Lebanon constitutes a threat to international peace and security,
> 1. *Call[ed] for* a full cessation of hostilities based upon, in particular, the immediate cessation by Hizbollah of all

> attacks and the immediate cessation by Israel of all offensive military operations;

In operative paragraphs 11, 12, 14, and 16, the Security Council increased the size of the UN Interim Force in Lebanon ("UNIFIL"), expanded its mandate and authority, and extended it through August 31, 2007, and called for Lebanon to secure its borders. In paragraph 15 the Security Council imposed an embargo, deciding

> . . . that all States shall take the necessary measures to prevent, by their nationals or from their territories or using their flag vessels or aircraft:
> (a) The sale or supply to any entity or individual in Lebanon of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, whether or not originating in their territories; and
> (b) The provision to any entity or individual in Lebanon of any technical training or assistance related to the provision, manufacture, maintenance or use of the items listed in subparagraph (a) above; except that these prohibitions shall not apply to arms, related material, training or assistance authorized by the Government of Lebanon or by UNIFIL as authorized in paragraph 11;

Secretary of State Condoleezza Rice summarized the provisions of Resolution 1701 and explained the U.S. vote in favor of its adoption in a statement to the Security Council on August 11. The full text of Secretary Rice's statement, excerpted below, is available at *www.un.int/usa/06_202.htm*. *See also* statement by President Bush on August 12, available at 42 WEEKLY COMP. PRES. DOC.1456 (Aug. 21, 2006) and testimony by C. David Welch, Assistant Secretary of State for Near Eastern Affairs before the Senate Foreign Relations Committee, entitled "Review of the Situation in Lebanon and the Way Ahead," September 13, 2006, available at *www.state.gov/p/nea/rls/rm/2006/72154.htm#arms*.

* * * *

The status quo that precipitated this conflict was unstable. Since the conflict began, we have sought an immediate end to the fighting. But we have also insisted that a durable ceasefire requires a decisive change from the status quo that produced this war.

Today's resolution lays the foundation to achieve that goal. With this resolution, a new—stronger—Lebanon can emerge with the world's help. Now the hard, urgent work of implementation begins. Today's resolution accomplishes three important objectives. First, it puts in place a full cessation of hostilities, while insisting on the unconditional release of the abducted Israeli soldiers. Hezbollah must immediately cease its attacks on Israel—and Israel must halt its offensive military operations in Lebanon, while reserving the right of any sovereign state to defend itself.

In addition to respecting this resolution's call for a full cessation of hostilities, we believe that all parties should also take action to protect civilians, as was called for in the four principles of the 1996 Understanding.* We urge the governments of Lebanon and Israel to commit to ending large-scale violence. Hezbollah now

---

* Editor's note: The Israel-Lebanon Ceasefire Understanding, announced April 26, 1996, available at *www.usip.org/library/pa/Israel_lebanon/il_ceasefire_1996.html*, provided in part:

> The United States understands that after discussions with the governments of Israel and Lebanon, and in consultation with Syria, Lebanon and Israel will ensure the following:
>
> 1. Armed groups in Lebanon will not carry out attacks by Katyusha rockets or by any kind of weapon into Israel.
> 2. Israel and those cooperating with it will not fire any kind of weapon at civilians or civilian targets in Lebanon.
> 3. Beyond this, the two parties commit to ensuring that under no circumstances will civilians be the target of attack and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks.
> 4. Without violating this understanding, nothing herein shall preclude any party from exercising the right of self-defense.
>
> A Monitoring Group is established consisting of the United States, France, Syria, Lebanon and Israel. Its task will be to monitor the application of the understanding stated above. Complaints will be submitted to the Monitoring Group.

faces a clear choice between war and peace, and the world will help to ensure that their choice is the right one.

Second, this resolution will help the democratic government of Lebanon to expand its sovereign authority, as called for in Resolution 1559. It will do so by creating a new international force that builds on the current UN force in Lebanon—UNIFIL.

Though it will bear the same name, this will not be the same force. It will be an enhanced UNIFIL.

As the government of Lebanon has requested, this new force will have an expanded mandate, a greater scope of operations, better equipment, and much larger numbers—a target of 15,000 soldiers, a seven-fold increase in its current strength.

The Lebanese Armed Forces, together with this new stabilization force, will deploy to the south of the country to protect the Lebanese people and to ensure that no armed groups like Hezbollah can threaten stability. As this deployment occurs, Israel will withdraw behind the Blue Line. Today's resolution makes very clear that these are parallel processes. It also calls for the opening of Lebanese harbors and airports, which we expect will be for verifiably civilian purposes.

With the deployment and withdrawal, a full ceasefire will go into effect. And the Council has said it intends to adopt another resolution with further measures to help that ceasefire become permanent. We look forward to the Secretary General's proposals to fully implement Resolutions 1559 and 1680, including the question of disarmament.

To further strengthen Lebanon's democracy, the international community is imposing a binding embargo on all weapons heading into the country without the government's consent. Today, we call upon every state, especially Iran and Syria, to respect the sovereignty of the Lebanese government and the will of the international community.

Finally, this resolution clearly lays out the political principles to secure a lasting peace: No foreign forces, no weapons, and no authority in Lebanon other than that of the independent Lebanese government, which must have complete sovereign authority over its entire country.

These principles represent a long-standing international consensus that was first expressed in UN Resolution 425—then affirmed in the Taif Accords, and reaffirmed in Resolutions 1559 and 1680. On July 16, the G-8 leaders endorsed the same political conditions in St. Petersburg, and ten days later, the Lebanon Core Group supported these principles at the Rome Conference.

This resolution also offers a way forward to implement Resolution 1680, which addresses the delineation of the Lebanese border, including Sheb'a farms. At the same time, we must ensure Israel's security and respect the underlying framework to achieve a comprehensive, just, and lasting peace in the region, in accordance with UN Resolution 242.

Fellow Council members: Today in no way marks the end of our common efforts. In many respects, the hard work of diplomacy is only just beginning. Though it is our hope that this resolution will lead to the cessation of large-scale hostilities, no one should expect an immediate end to all acts of violence. The conditions of a lasting peace must be nurtured over time, with the goodwill of the Lebanese and Israeli governments, and with the sustained commitment of the international community.

Our most pressing challenge now is to help the thousands of displaced people within Lebanon to return to their homes and rebuild their lives. The reconstruction of Lebanon will be led by the government of Lebanon, but it will demand the generosity of the entire international community.

* * * *

. . . The past month has been marked by overwhelming suffering, and heartache, and loss—both in Lebanon and in Israel. And this resolution is refreshingly clear about how this tragedy began: Six years after Israel withdrew completely from Lebanon, a terrorist group—Hezbollah—crossed an international boundary, captured and killed Israeli soldiers, and began firing thousands of rockets into Israeli cities.

Hezbollah and its sponsors have also brought devastation upon the people of Lebanon, dragging them into a war they did not choose, and exploiting them as human shields.

The people of the Middle East have lived for too long at the mercy of extremists. It is time to build a more hopeful future. And this resolution shows us the way. It is now the solemn responsibility of the international community to help the people of Lebanon and Israel to transform this tragedy into opportunity—an opportunity to overcome old patterns of violence, and to build a new foundation for stable and sustainable peace.

* * * *

On August 13, 2006, Israel's Cabinet approved a cease-fire.

On August 22, 2006, Ambassador Bolton addressed the Security Council on implementation of Resolution 1701. Ambassador Bolton's remarks, excerpted below, are available at *www.un.int/usa/06_210.htm*.

---

* * * *

In addition to alleviating the humanitarian problems unfolding in Southern Lebanon, it is imperative that we move as quickly as possible to secure the peace by enhancing UNIFIL, and providing robust rules of engagement. We urge potential troop contributing countries to expedite their internal decision-making processes as we strive to reach our goal of an expanded 15,000-member international force. Delay in this case does not serve the interests of anyone except those who oppose a sovereign, free and democratic Lebanon, one which is no longer used as a base to launch terrorist attacks against Israel, killing its innocent civilians.

As we plan for this deployment, we should be encouraged that, broadly speaking, one of the important goals of Resolution 1701 has been achieved—a cessation of hostilities. We are concerned, of course, by reports of sporadic violence, but we stress that Resolution 1701 guarantees Israel's right to defend itself and its forces. Israel has said that this past weekend's operation in the Bekaa valley was targeted against arms shipments to Hezbollah from Iran and Syria. Such arms shipments are, of course, legally prohibited by the arms embargo established by Resolution 1701 unless specifically

authorized by the Government of Lebanon. All states must comply with their obligations observe this embargo, which, if not strictly observed, will significantly enhance the risk of further hostilities. This burden of abiding by the arms embargo, and the world's attention, falls especially on Syria and Iran.

Resolution 1701 is not just about a cessation of hostilities. Resolution 1701 correctly emphasizes not only the need for an end of violence, but "the need to address urgently the causes that have given rise to the current crisis, including the unconditional release of the abducted Israeli soldiers." It is impossible, indeed dangerous, to divorce the two issues. If the international community applies only a temporary band-aid solution to the problem and allows Hezbollah to regroup and re-arm, then the suffering of the people of Lebanon and Israel may very well intensify in the near future. But we must keep in mind that responsibility for this conflict rests squarely on the shoulders [of] Hezbollah. As President Bush stated unequivocally last week: "It was an unprovoked attack by Hezbollah on Israel that started this conflict. Hezbollah terrorists targeted Israeli civilians with daily rocket attacks. Hezbollah terrorists used Lebanese civilians as human shields, sacrificing the innocent in an effort to protect themselves from Israeli response."

If we are to achieve the goal of a lasting peace in the region, then we must put an end to Hezbollah operating as a state within a state. To do so, of course, requires us to address the backing of Hezbollah by Damascus and Tehran. Their continued support to Hezbollah in the form of financing, training and supply of armaments does not just perpetuate this crisis—it sustains it. Cutting off these supply lines, as mandated in 1701, is a matter that can no longer be ignored. The United States calls upon Iran and Syria to comply immediately with Resolution 1701.

The United States remains deeply concerned with the attitude of Syria and Iran in this crisis—states whose leaders have both respectively called for the destruction of Israel in recent days. We recognize, as President Bush stated last week, that: "The conflict in Lebanon is part of a broader struggle between freedom and terror that is unfolding across the region." We believe that full implementation of Resolution 1701 will lay the foundation to achieve a lasting peace and realize the goals outlined originally in

Resolution 1559—a sovereign and democratically elected government in Lebanon, free from coercion by all outside governments.

* * * *

In the days ahead, we look forward to the continued implementation of Resolution 1701. But we cannot stress enough the urgent need to move quickly to implement fully the obligations imposed on us in accordance with Resolution 1701. The price of failure in this case is to condemn the people of Lebanon and Israel to further violence and tragedy.

On November 21, 2006, Lebanese Industry Minister Pierre Gemayel was assassinated. In a statement of the same date, President Bush stressed the U.S. commitment to independence and democracy in Lebanon, as set forth below and available at 42 WEEKLY COMP. PRES. DOC. 2086 (Nov. 27, 2006).

Today's assassination of Lebanese Industry Minister Pierre Gemayel shows yet again the viciousness of those who are trying to destabilize that country.

The United States remains fully committed to supporting Lebanon's independence and democracy in the face of attempts by Syria, Iran, and their allies within Lebanon to foment instability and violence. Syria's refusal to cease and desist from its continuing efforts to destabilize Lebanon's democratically elected government is a repeated violation of United Nations Security Council Resolutions 1559 and 1701. The United States will continue its efforts with allied nations and democratic forces in Lebanon to resist these efforts and protect Lebanon's sovereignty and democratic institutions.

We urge the U.N. Security Council and the Secretary-General today to take the remaining steps needed to establish the special tribunal for Lebanon that will try those accused of involvement in the assassination of former Prime Minister Hariri, and to ensure that that tribunal can also bring to justice those responsible for related assassinations, assassination attempts, and other terrorist attacks. We also demand that Syria treat Lebanon as a genuinely

sovereign neighbor, establishing full diplomatic relations with Lebanon, and delineating its border with that country, including, in particular, in the Shab'a Farms area, through a bilateral agreement.

4. Sudan: Darfur

On May 5, 2006, the largest rebel group in Darfur, the Sudan Liberation Movement, led by Mini Menawi, and the Government of Sudan signed the Darfur Peace Agreement. A fact sheet released by the Department of State on May 8, 2006, is excerpted below and available at *www.state.gov/r/pa/prs/ps/2006/65972.htm. See also* remarks by President Bush welcoming the peace agreement and discussing future participation by the United States in the region. 42 WEEKLY COMP. PRES. DOC. 884 (May 15, 2006).

The Darfur Peace Agreement . . . is an important achievement for peace in Darfur. It is a fair agreement that addresses the long-standing marginalization of Darfur, and charts a path for lasting peace for the innocent victims of the crisis.

The agreement requires that the Sudanese Government of National Unity complete verifiable disarmament and demobilization of Janjaweed militia by mid-October 2006 and places restrictions on the movements of the Popular Defense Forces and requires their downsizing. A detailed sequencing and phasing schedule ensures that the African Union certifies that Janjaweed and other armed militia have been disarmed before rebel forces assemble and prepare for their own disarmament and demobilization. . . .

Democratic processes have been laid out for the people of Darfur to choose their leaders and determine their status as a region. . . .

The accord commits the international community to holding a donors' conference to pledge additional funds for Darfur, and invites the TDRA Chairperson to present to that conference a summary of needs and priorities. . . .

Buffer zones are to be established around camps for internally displaced persons and humanitarian assistance corridors, and a commission has been created to work with the United Nations to

help refugees and displaced persons return to their homes. The agreement provides that the Sudanese Government will provide $30 million in compensation to victims of the conflict.

On May 16, 2006, the Security Council adopted Resolution 1679 welcoming the Darfur Peace Agreement ("DPA") and commending the successful operation of the African Union Mission in the Sudan ("AMIS"). Acting under Chapter VII of the UN Charter, the Security Council called upon the parties to the DPA "to respect their commitments and implement the agreement without delay," urged parties that have not signed the agreement "to do so without delay and not to act in any way that would impede implementation of the agreement," and expressed its intention to consider taking measures against "any individual or group that violates or attempts to block the implementation of" the DPA. The Security Council also endorsed the May 15, 2006, decision of the African Union ("AU") Peace and Security Council that "in view of the signing of the Darfur Peace Agreement, concrete steps should be taken to effect the transition from AMIS to a United Nations operation," and called for the deployment of a joint AU and UN technical assessment mission.

In a press interview in London on May 17, 2006, then Deputy Secretary of State Robert B. Zoellick commented on the role of the United States as mediator in the negotiation of the DPA and related issues. The full text of Mr. Zoellick's remarks, excerpted below, is available at *www.state.gov/s/d/former/zoellick/rem/2006/66414.htm.*

---

* * * *

DEPUTY SECRETARY ZOELLICK: I think the resolution is a good step and I think it builds on something . . . that was equally important which is the statement by the African Union Peace and Security Council. Together what those two positions represent is the coming together of Africa and . . . the international community to emphasise the importance of the Abuja Peace Accord and the follow-up. . . . The challenge here is taking words on paper and

making them into new facts on the ground. That relates to a whole series of issues on the implementation side.

* * * *

An . . . important issue is including security on the ground. Yes, we have an agreement and the terms are such that it creates the right incentives for people to be mobilized . . . and eventually integrate rebel forces. But you still have a very dangerous situation. So anything that can be done to strengthen the current AMIS of the African Union forces is important. We have been in touch with the Rwandans who were considering perhaps adding some troops. It is one of the reasons why President Bush has encouraged NATO to try to help in a planning sense, because the approximately 7000 African Union forces are spread out in an area the size of France. Their effectiveness could be enhanced a great deal if they get better intelligence on where problems are arising. If they could move the tactical transport more quickly to the areas were there are problems. If one could help with the logistics and the fuel on the operational planning.

So there are ways in which regional organizations could help that.

Third, and this is what relates to the resolution, you want to get the UN forces in as quickly as you can. But one has to recognize that it is still going to take time to assemble those forces and get them into place. And then what is equally as important is trying to encourage all the different rebel groups to participate in this. That is what the African Union is trying to do this week. And get the government to follow through on its obligations. So, in sum, the peace accord is an opportunity. It is an important step, but there is a lot of work to be done to bring this to fruition. One always has to keep in mind that two million people that are struggling in these camps. . . .

* * * *

QUESTION: So having said that, do you think that if these peace accords could come into fruition and for the Janjaweed militias to be disarmed, you can see a day for the normalization of relations between the US and Sudan?

DEPUTY SECRETARY ZOELLICK: That is what we are working towards. . . .

QUESTION: Speaking about the Abuja peace accord, were you satisfied with the Sudanese government's position? And do you think it can last without the remaining two factions signing up to the peace accord?

DEPUTY SECRETARY ZOELLICK: [T]hose are two separate questions. The first one, it is important to keep in mind the role that the US played, but also the role the African Union played. We were mediators. This was an agreement between the government and the rebel movements. Now when I and some of the other international partners came in, you had a situation where the African Union, after months and months and months of discussions and deliberations, had put forward what I thought was a very fine draft, but the government of Sudan had agreed but the rebel movements had not. So what I and my colleagues tried to do was first listen closely to the rebel groups and try to get an understanding of the greater sensitivities to see if we could come up with some suggested amendments. So the government accepted the first deal, and I am pleased that the government accepted the Accord with the amendments, which were in both the security [and] in some of the political and economic issues.

As for your second question about the rebel movements, as I said at the time, I think Mini Menawi and his commanders took a courageous decision to take a step for peace. . . . [I]t would certainly be preferable if Abdel Wahid's faction can move forward with this as well. Everybody has tried to do as much as they can to try to encourage them. But ultimately it has to be their decision.

There is one other step that I want to draw your attention to. The Accord developed and we helped refine this, a Darfur-Darfur dialogue. And it is important to keep in mind that while the rebel leaders represent constituencies, there are other groups and other tribes in Darfur who have been really been neutral in this process. And so while the rebel movements have a claim on some loyalties they don't necessarily represent everybody. Now the way this should ultimately be decided, this is in the agreement, is through elections. That is how you determine whether you represent people or not. But there is a political power sharing arrangement for a

few years until you move to the elections, and a transitional Darfur authority. The Darfur-Darfur dialogue is quite important because it allows the area to broaden the participation so it includes rebel movements and others. I think that also goes to the crux of your question, which is we need to build acceptability in the Accord.

* * * *

On August 10, 2006, the United States issued a press statement condemning the continuing violence in Darfur. The press statement, set forth below, is available at *www.state.gov/r/pa/prs/ps/2006/70217.htm. See also* statement to the press by Assistant Secretary for African Affairs Jendayi Frazer on August 24, 2006, available at *www.state.gov/p/af/rls/rm/2006/71515.htm,* and fact sheet available at *www.state.gov/r/pa/scp/2006/71526.htm.*

The United States strongly condemns the violence in Darfur that continues to result in the deaths of humanitarian workers and innocent civilians and hinders the distribution of life-saving humanitarian assistance to areas of Darfur.

We call upon all groups in Darfur to refrain from violent attacks, recognize their responsibilities, and abide by the Darfur Peace Agreement (DPA) and the N'djamena Cease-Fire Agreement. We urge all groups to cooperate fully with the African Union Mission in Sudan (AMIS), adhere to United Nations Security Council resolutions, proceed with the full implementation of the DPA, and respect international law as it pertains to protecting humanitarian workers and the innocent people of Darfur who have suffered for so long.

The United States is firmly committed to peace in Sudan. The DPA provides the best opportunity for lasting security, peace, reconciliation, and reconstruction in Darfur. It accommodates the reasonable political, economic, and security goals of the people of Darfur.

* * * *

The African Union has consistently called for transition of AMIS to a UN operation without delay. Such a transition should take place by October 1. We call on Sudan's Government of

National Unity to immediately accept a UN peacekeeping force and for the UN to begin deploying its troops without delay.

On August 31, 2006, the Security Council adopted Resolution 1706 in which it decided in operative paragraph 1:

> without prejudice to its existing mandate and operations as provided for in resolution 1590 (2005) and in order to support the early and effective implementation of the Darfur Peace Agreement, that UNMIS' mandate shall be expanded as specified in paragraphs 8, 9 and 12 below, that it shall deploy to Darfur, and therefore invites the consent of the Government of National Unity for this deployment, and urges Member States to provide the capability for an expeditious deployment[.]

In operative paragraph 12, the Security Council, acting under Chapter VII of the UN Charter, decided that UNMIS

> . . . is authorized to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities:
>
> — to protect United Nations personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under threat of physical violence,
> — in order to support early and effective implementation of the Darfur Peace Agreement, to prevent attacks and threats against civilians,
> — to seize or collect, as appropriate, arms or related material whose presence in Darfur is in violation of the Agreements and the measures imposed by paragraphs 7 and 8 of resolution 1556, and to dispose of such arms and related material as appropriate[.]

In a statement of the same date, Ambassador Bolton commented on Resolution 1706 as set forth below and available at *www.un.int/usa/06_219.htm*.

We are pleased that the Security Council has taken this important step in passing Resolution 1706. It is imperative that we move immediately to implement it fully to stop the tragic events unfolding in Darfur. Every day we delay only adds to the suffering of the Sudanese people and extends the genocide.

The United States calls on the Government of Sudan to comply fully with Resolution 1706 and cooperate with the UN as we begin the work of implementation. Paragraph 1 of the resolution invites the Government of Sudan to consent to deployment, though nothing in this language requires their consent. We expect their full and unconditional cooperation and support with the new UN peacekeeping force. Failure on the Government of Sudan's part to do so will significantly undermine the Darfur Peace Agreement and prolong the humanitarian crisis in Darfur.

Resolution 1706 sets the foundation for an effective, multidimensional international force. With the expansion of the force up to 17,000 military personnel and over 3,000 civilian police, we can now expect that the AMIS rehatting will take place rapidly and smoothly, and that the follow-on UN force will be fully operational, with a substantial African element at its core.

Significant planning and logistical work has already taken place. Now with the passage of this Resolution, we can begin finalizing those details as we prepare to deploy the force. The United States is prepared to assist immediately in that regard. We cannot afford to delay.

* * * *

On September 22, 2006, Secretary of State Rice addressed the Security Council in connection with a periodic extension of the mandate of UNMIS in Resolution 1709. The full text of the Secretary's statement, excerpted below, is available at *www.state.gov/secretary/rm/2006/73023.htm*.

The Darfur Peace Agreement, signed in May, provides a political framework to end the conflict and to open a path to peace, freedom, and opportunity for the people of Darfur. The future of this agreement, however, is now at risk. The Government of Sudan has launched a military offensive, and the security situation in Darfur is deteriorating.

* * * *

Last month, the international community answered this call and the Security Council passed Resolution 1706—authorizing the deployment of more than 20,000 UN troops and police to Sudan. Transitioning the current AU force, without further delay, into a larger, more robust UN peacekeeping force is absolutely vital to the security of Darfur and to the implementation of the Darfur Peace Agreement.

The one remaining obstacle is the Government of Sudan, which thus far has opposed a UN presence in Darfur. I would be quick to note that this opposition has not been unanimous within Sudan's Government, and we welcome the support of the Sudanese Peoples Liberation Movement and the Sudan Liberation Movement for the deployment of a UN force to Darfur.

It is now time for the Sudanese Government to accept the will of the United Nations, to work with us fully in implementing Resolution 1706, and to meet its obligations under the Darfur Peace Agreement.

Our intention—I want to underscore—is not to impinge upon Sudan's sovereignty. But let there be no doubt about our resolve. As President Bush said on Tuesday, "If the Sudanese Government does not approve the peacekeeping force quickly, the United Nations must find a way to act."

Ladies and Gentlemen: Time is running out. The violence in Darfur is not subsiding; it is getting worse. The international community has pledged to end the conflict in Darfur. It pledged to help end the suffering of the people of Darfur. And we have committed to a course of action that can achieve these goals. Now we must match the strength of our convictions with the will to realize them.

If the notion of the "responsibility to protect" that we all agreed to last year—if the notion of the responsibility to protect

the weakest and most powerless among us is ever to be more than an empty promise, then we must take action in Darfur. This is a profound test for the international community, and we must show that we are equal to it.

On September 19, 2006, President Bush named former AID Administrator Andrew Natsios as Presidential Special Envoy "to lead America's efforts to resolve the outstanding disputes and help bring peace" to Darfur. *See* President Bush's address to the United Nations, available at 42 WEEKLY COMP. PRES. DOC. 1633 (Sept. 25, 2006) and Department of State press release announcing the appointment at *www.state.gov/r/pa/prs/ps/2006/72830.htm*.

On November 16, 2006, Mr. Natsios represented the United States in a high-level consultation meeting on the situation in Darfur at the African Union headquarters in Addis Ababa. UN Secretary-General Kofi Annan, who co-chaired the consultation with AU Chairperson Oumar Konare, spoke with press following the meeting, stating:

> . . . We have a conclusions document . . . . [T]he highlights are: Darfur can only be resolved through political process. The political process should be all-inclusive and the DPA . . . is the only basis for this process. The mediation should be credible and under AU and UN leadership. The process should be transparent and should include wider international involvement.

The text of Secretary-General Annan's statement to the press, which includes the text of the Conclusions of Consultation on Darfur, is available at *www.un.org/apps/sg/offthecuff.asp?nid=950*. Mr. Natsios issued a statement on the same date:

> [At the high-level meeting in Addis Ababa,][r]epresentatives of the international community approved a new framework for protecting victims of the atrocities in Darfur, and resolving the political crisis. In a consensus document, representatives from the African Union, including Gabon, South Africa, Senegal, Rwanda, Nigeria and

> the Republic of the Congo, the Arab League, including Egypt and Libya, the United States, the United Kingdom, France, China, Russia, the European Union, and Sudan affirmed the major elements of United Nations Security Council Resolution 1706. This includes the expansion of the peacekeeping force in Darfur to approximately 20,000. The force would be primarily African in composition and commanded by an African general. The United States welcomes the successful outcome of this historic meeting.
>
> Mr. Natsios' statement is available at www.state.gov/r/pa/prs/ps/2006/76219.htm.
>
> On November 20, 2006, Special Envoy Natsios held a press briefing on the high-level consultation and other Sudan-related issues. The full text of the press briefing, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2006/76411.htm.*

---

* * * *

Our position now is to support the single process that we've set before us between now and the end of the year that is being led by Kofi Annan. It's not that we agree with the United Nations on everything, but on [certain] critical issues with respect to the peacekeeping operation there is, I think, unanimity of opinion between the United Nations and the United States Government. . . .

So I think one of the accomplishments of the effort was a consensus-building among African leaders, among European leaders, United States, the Chinese, the Russians were there, and the Arab states behind an attempt to get a resolution of this and a effective and efficient peacekeeping operation. Ultimately, if we do not protect the people on the ground, this is not going to succeed. . . . There has to be some political process to resolve the issues outstanding in Darfur. The DPA certainly is a base for that. But in and of itself, it does not gather enough support to prevent that from happening.

. . . I think there is one thing there is general agreement on between the Sudanese Government, the United Nations, the African Union and the rest of us bilaterally is that we should start with a DPA and add protocols onto it on the remaining issues that have not been resolved such as compensation for individual people who are in the camps whose livestock has been looted, whose homes have been destroyed, whose farm equipment is gone, who could not go back to their villages without some kind of package of support.

* * * *

. . . [T]he backstopping of the force that would come in from the United Nations to AMIS was explicitly agreed to by the Sudanese delegation.

The Sudanese also have accepted the notion of UN funding of the [peacekeeping] operation. I'm not sure everybody understands entirely what that means. Not in terms of the source of the revenue—it would clearly be the UN regular peacekeeping operation budget—but the processes that would be needed to get the UN to agree to what is a hybrid. And a hybrid means the UN and the AU would work together. The S[R]SG, the Special Representative of the Secretary General of the UN, and the senior political appointee of the African Union in Sudan would be a single position jointly appointed by both the AU and the UN. . . . Having one person with a dual appointment we think makes sense. And the proposal in the package as well is that the general force commander of this new force, this hybrid force, would also be a joint appointment. . . .

And finally, the document says that the command-and-control structure, which is critically important, would be through the United Nations. It would be to [the UN Department of Peacekeeping Operations] in New York.

Ultimately though, what counts is whether this is effective or not. And so in the draft there is a long statement about, one, a cease-fire. We have a cease-fire now that's . . . been more violated than it has implemented by the parties. We need an effective cease-fire that really works and a mechanism for monitoring that. . . .

We also need a process which the document that was produced at Addis says should be managed by the UN and the AU. There are . . . six different initiatives now to get a supplemental process for adding these protocols to the Darfur Peace Agreement that I mentioned earlier. We can't have six processes. . . . It will ensure we never have a final definitive set of protocols.

* * * *

[W]e are still urging them to accept the UN force and under the principles within 1706. 1706 has now become . . . a red line for everybody. We . . . still support it and the Sudanese will never support it. So the strategy has been to look [at] what is actually in the resolution. And all of the major elements of 1706 that we think are important to create an efficient and effective force in Sudan [are] in the Addis agreement, and more actually.

* * * *

On December 19, 2006, the Security Council issued a Presidential Statement in which it "endors[ed] the conclusions of the Addis Ababa high-level Consultation on the situation in Darfur and the communiqué of the 66th meeting of the Peace and Security Council of the African Union held in Abuja on 30 November 2006 [endorsing the high-level consultation conclusions]" and "welcome[d] the stated commitment of the Government of National Unity to the conclusions and the communiqué." The statement continued:

> The Security Council calls for the conclusions and the communiqué to be implemented by all parties without delay, and to this end calls on all parties to facilitate, per the Addis Ababa and Abuja agreements, the immediate deployment of the United Nations Light and Heavy Support Packages to the African Union Mission in the Sudan and a hybrid operation in Darfur, for which backstopping and command and control structures and systems will be provided by the United Nations. . . .

U.N. Doc. S/PRST/2006/55, available at *http://documents.un.org*.

In a press briefing on that date, Mr. Natsios stated that the compromise on peacekeeping forces negotiated in Addis Ababa "is now at an impasse. It's paralyzed because the Sudanese Government does not want any blue helmeted or blue beret people from the United Nations, even if under the Addis Agreement, in Darfur." Mr. Natsios explained that the United States had proposed the Presidential Statement at the request of Sudanese President Bashir:

> . . . [W]e have done what President Bashir asked me to do. He asked for a PRST affirming the Addis and Abuja agreement[s], affirming the command and control would be with the United Nations. And we would hope now that the Sudanese Government would respond by dealing with the impasse over the issue of [peacekeeping].
>
> * * * *
>
> The next step in this process, should the Sudanese do what we've asked them to do and endorse and make progress operationally on the elements of the Addis compromise, then we will look toward putting some proposals on the table to deal with the political problems in Darfur, because only a political solution will solve the Darfur crisis. UN troops are a stabilizing force. They will help implement a peace settlement, but a UN force is not a settlement. It's a necessary component of it.
>
> * * * *

At the end of 2006, efforts to implement UN Security Resolution 1706 and the conclusions agreed at the high-level consultations in Addis Ababa were ongoing.

See also U.S. statement at the December 12, 2006, special session of the Human Rights Council on Darfur, Chapter 6.A.2.b.(2)(iii), and discussion of sanctions imposed on Sudan following UN Security Council Resolution 1672 and enactment of the Darfur Peace Accountability Act in Chapter 16.A.1.

5. Ethiopia-Eritrea

On February 22, 2006, the witnesses to the Algiers Agreement between Ethiopia and Eritrea met in New York. The four witnesses, Algeria, the African Union, the European Union, and the United States, issued a statement on the current situation between Ethiopia and Eritrea as excerpted below. The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2006/62202.htm*.

The Witnesses to the Algiers Agreement of 12 December 2000 (Algeria, the African Union, the European Union, the United States, and the United Nations, the "Witnesses") met on February 22, at the United Nations. The Witnesses remain fully committed to the implementation of that Agreement, as well as to the Algiers Agreement on Cessation of Hostilities of 18 June 2000 ("the Agreements") and welcome and endorse the initiative by the United States of America, in cooperation with and with the full support of the other Witnesses, to resolve the current impasse in the peace process between Eritrea and Ethiopia in order to promote stability and good relations between the parties and lay the foundation for sustainable peace in the region.

The Witnesses recognize the special role of the African Union and its importance to confidence building between the parties in support of any initiative in the demarcation process.

The Witnesses stress that the parties must implement the Algiers Agreement of 12 December 2000 fully and without qualification. The Witnesses believe it is crucial that the parties meet their obligations under that Agreement, as well as under the Agreement on Cessation of Hostilities.

Consistent with Article 1 of the December 12, 2000 Agreement, each party must refrain from the threat or use of force against the other.

The Witnesses recall that both Ethiopia and Eritrea committed themselves to accepting the delimitation and demarcation determinations of the Eritrea-Ethiopia Boundary commission (EEBC) as final and binding, under Article 4.15 of the Algiers Agreement of

12 December 2000. The Witnesses expect each Government to uphold its commitment and to cooperate with the EEBC to implement its decisions without further delay. The Witnesses urge the Commission to convene a meeting with the parties and invite the Commission to consider the need for technical discussions with the support of a neutral facilitator to assist with the process of demarcation. The Witnesses strongly urge the parties to attend the EEBC meeting and to cooperate with and abide by all requirements specified by the Commission in order to successfully conclude the demarcation process.

The Witnesses commend the role of the United Nations Mission in Ethiopia and Eritrea (UNMEE). The Witnesses urge the parties to permit UNMEE to perform its duties without any restrictions and call on the parties to ensure the free movement of UNMEE personnel in the performance of their responsibilities, including its mandated responsibility, as specified in Security Council resolutions 1430 (2002) and 1466 (2003), including to assist the EEBC in the expeditious and orderly implementation of the Delimitation Decision. In particular, the Witnesses note that demarcation of the border cannot proceed unless UNMEE is allowed full freedom of movement throughout its area of operations.

The Witnesses believe the U.S. initiative agreed today will help resolve the differences between the parties and encourage the U.S. to pursue it with the parties. The Witnesses also call on the international community to support it, including through continued support for UNMEE and through contributions to the Trust Fund, established pursuant to Security Council resolution 1177 (1998) and referred to in Article 4.17 of the Algiers Agreement of 12 December 2000, to support the demarcation of the border.

In remarks to the press on January 9, Ambassador Bolton explained the U.S. initiative referred to in the statement by the witnesses as follows:

> This morning . . . I reported to the Council that the United States for some time . . . has felt that what we should be doing is focus on the underlying political dispute between Ethiopian and Eritrea. And that is to say beginning the demarcation, that is to say the boundary, that had been

> decided upon by the Boundary Commission that the parties had agreed to in 2000 in the Algiers Agreement. Today I informed the Council that the United States was prepared to undertake an initiative to see if we can move forward on the demarcation process. And Assistant Secretary of State for African Affairs Jendayi Frazer will be traveling to the region with General Carlton Fulford and others to discuss how to begin implementation of the demarcation process. . . . [W]e felt that this kind of diplomatic initiative could bring movement on the underlying political dispute. Accordingly, in order to give some space for this diplomatic initiative and in order not to send any signals, politically or otherwise, that might complicate it, I asked that we preserve the status quo on the UNMEE force disposition. I know the Secretary General had proposed six options in his most recent report, and essentially what we asked is if we could simply freeze the status quo for 30 days while our initiative proceeded. . . .

The Security Council adopted Resolution 1661 on March 14, 2006, in which it stressed its "unwavering commitment to the peace process" in Ethiopia and Eritrea, welcomed the successful meeting of the witnesses, reiterated the need for the parties to achieve full demarcation of the border and to allow UNMEE to perform its duties without restrictions, and renewed the mandate of UNMEE. In Resolutions 1670, 1678, 1681, and 1710, the Security Council continued to address these issues.

On November 27, 2006, the Ethiopia-Eritrea Boundary Commission issued a statement with an accompanying Annex setting forth a set of boundary points representing those locations "at which, if the Commission were so enabled by the Parties, it would construct permanent pillars" representing physical demarcation of the boundary. The statement specified that the Parties should, over the following twelve-month period terminating in November 2007, "seek to reach agreement on the emplacement of pillars" and that if

the parties failed to do so, and have not requested and enabled the Commission to resume its physical demarcation activity, the boundary "will automatically stand as demarcated by the boundary points provided in the Annex hereto." The EEBC statement, with annex and overview map, is available at *www.state.gov/s/l/c8183.htm*.

6. Placement of Burma on Security Council Agenda

On September 1, 2006, Ambassador Bolton transmitted a letter to the President of the UN Security Council requesting that Burma be placed on the Security Council's agenda, as set forth below and available at *www.un.int/usa/06_225.htm*.

The United States and other members of the Security Council are concerned about the deteriorating situation in Myanmar, known to the United States as Burma, and this situation is likely to endanger the maintenance of international peace and security. In his briefing to the Council in December 2005 and June 2006, Under Secretary Gambari described the grave human rights and humanitarian conditions in Burma, including the detention of over 1,100 political prisoners, as well as the outflow from Burma of refugees, drugs, HIV/AIDS, and other diseases.

These conditions threaten to have a destabilizing impact on the region. Therefore, we request that the situation in Myanmar, known to the United States as Burma, be placed on the Council's agenda, and that a senior official of the Secretariat formally brief Member States in a meeting of the Security Council on this situation and its implications for international peace and security.

On September 15, 2006, in a procedural meeting in which no member has the right to veto, the Security Council voted to place Burma formally on its agenda with 10 votes in favor, 4 against (including China and Russia) and 1 abstention. U.N. Doc. S/PV.5526, available at *http://documents.un.org; see also* Security Council press release SC/8832, available at *www.un.org/News/Press/docs/2006/sc8832.doc.htm*. In response

to a question from a reporter after the vote, Ambassador Bolton explained:

> The charter of the U.N. makes it clear that the jurisdictional threshold for the Security Council to take action is that it must deal with threats to international peace and security or breaches of international peace and security or acts of aggression. So this is a jurisdictional threshold that we have to cross. And I think that the issue, really, was resolved as far back as Resolution 688 dealing with the flow of Kurdish refugees into Turkey and elsewhere caused by Saddam Hussein's repression after the first Persian Gulf War. So I see the procedural vote we've taken today as being entirely consistent with 688 and other resolutions subsequently adopted by the Council.

See www.un.int/usa/06_232.htm.

On September 29, 2006, Ambassador Bolton delivered a statement in the Security Council welcoming the placement of Burma on its agenda as an historic step:

> It demonstrated to both the people of Burma and to the regime the growing international concern over the welfare of the Burmese people and the regime's repressive policies and the serious implications that the deteriorating situation has for the peace and security of Southeast Asia.

In December the United States introduced a Security Council resolution on Burma. A press release by the Department of State on December 28, 2006, stated:

> We remain concerned about the deteriorating humanitarian and political situation in Burma, which poses a threat to stability in the region. We believe the time has come for the Security Council to take action to express its deep concern about Burma and its strong support for the Secretary General's "good offices" mandate, which is intended to encourage the Burmese leadership to take concrete steps toward greater freedom and improved humanitarian conditions for the Burmese people.

* * * *

The full text of the press statement is available at *www.state.gov/r/pa/prs/ps/2006/78328.htm*.

7. Conflict Diamonds

On December 4, 2006, the United States co-sponsored General Assembly Resolution 61/28, "The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts." In a statement to the General Assembly on that date, Barbara M. Barrett, Senior Adviser, stated:

> We have made great strides in controlling the flow of conflict diamonds since the late 1990s witnessed brutal atrocities in Africa. Governments have joined forces with the diamond industry and civil society to control and monitor international trade in rough diamonds through the Kimberley Process. We join those in the international community who commend the Kimberley Process for dramatically reducing the flow of conflict diamonds and thus contributing to regional security, peace and stability.

The full text of Ms. Barrett's statement is available at *www.un.int/usa/06_379.htm*. *See also* Federal Register notice by Department of State, Bureau of Economic and Business Affairs updating implementation of the Clean Diamond Trade Act in the United States. 71 Fed. Reg. 77,435 (Dec. 26, 2006).

B. PEACEKEEPING AND RELATED ISSUES

1. Lebanon

As discussed in A.3 *supra*, on August 11, the United Nations adopted Resolution 1701 that, among other things, created what Secretary Rice referred to as "a new international force that builds on the current UN force in Lebanon—UNIFIL." *See also* Resolution 1697, extending the mandate of UNIFIL until August 31, adopted on July 31, 2006.

On September 13, 2006, C. David Welch, Assistant Secretary of State for Near Eastern Affairs, testified before the Senate Foreign Relations Committee. His testimony, entitled "Review of the Situation in Lebanon and the Way Ahead," is available at *www.state.gov/p/nea/rls/rm/2006/72154.htm#arms.*

As to the expanded UNIFIL, he stated:

> We are making good progress. For the first time in almost 40 years, the Lebanese Armed Forces have deployed to the south. Capable new UNIFIL forces, much more heavily armed and numerous and with an expanded and robust mandate, are accompanying them, and force commitments are nearing their desired levels. Also for the first time, UNIFIL has a maritime role. Reflecting these developments, and as a result of significant diplomatic efforts by Secretary Rice with the Israelis, Lebanese and the UN, Israel lifted its air blockade on September 7 and its maritime blockade on September 8.

* * * *

2. Somalia

On December 6, 2006, the Security Council adopted two resolutions on Somalia. In Resolution 1725, co-sponsored by the United States, the Security Council "deplor[ed] the bombing in Baidoa on 30 November 2006 and expres[ed its] concern regarding the continued violence inside Somalia." Acting under Chapter VII of the UN Charter, the Security Council in paragraph 3

> [d]ecide[d] to authorize IGAD and member States of the African Union to establish a protection and training mission in Somalia, to be reviewed after an initial period of six months by the Security Council with a briefing by IGAD, with . . . mandate [set forth in subparagraphs (a) through (e)] drawing on the relevant elements of the mandate and concept of operations specified in the Deployment Plan for IGASOM.

The Deployment Plan for a Peacekeeping Mission of the Intergovernmental Authority on Development ("IGAD") in Somalia ("IGASOM") was transmitted with a note verbale dated October 16, 2006, from the Permanent Mission of Kenya to the United Nations to the President of the Security Council, as indicated in preambular paragraph 12.

A statement on the adoption of Resolution 1725 by Ambassador Bolton is excerpted below and available at *www.un.int/usa/06_382.htm*. *See also* media note from the Department of State, "Deployment of a Regional Force Needed in Somalia," available at *www.state.gov/r/pa/prs/ps/2006/77021.htm*.

The United States is pleased to co-sponsor this resolution on Somalia with all of our African colleagues on the Security Council.

In Somalia, the security situation is deteriorating and tensions continue to run high, which is of deep concern to the United States.

Like many other Member States, we are concerned about the prospects for a wider regional conflict. However, the United States views the deployment of a regional force to Somalia as a key element in preventing conflict.

Through the International Somalia Contact Group, the United States is committed to working with our international partners to encourage dialogue among Somali parties. Despite these efforts and the June 22 Khartoum Declaration between the Transitional Federal Institutions ["TFIs"] and the Union of Islamic Courts ["UIC"], the situation in Somalia has not improved.

Although both parties have violated the terms of the Khartoum Declaration, the UIC has done so through concrete military expansion. It has sought to further destabilize the Horn of Africa region through irredentist claims on the Somali-populated regions of neighboring states and support for insurgent groups in Ethiopia.

The Intergovernmental Authority on Development (IGAD) and the African Union have put forth a proposal aimed at helping to restore stability in Somalia through deployment of a security, training, and protection mission. The primary purpose of this

deployment is to help stabilize Somalia by providing security in Baidoa, and protection and training for the TFIs, not to engage in offensive actions against the UIC.

The United States strongly believes that a sustainable solution in Somalia should be based on credible dialogue between the TFIs and the UIC, and we continue to work with our African and other partners toward that end. The continued military expansion by the UIC, however, has not helped to promote dialogue and, in fact, has created the need for deployment of a regional force to stabilize the situation inside Somalia.

The United States supports this regional proposal and views IGASOM deployment as a critical element to help resume credible dialogue between the TFIs and UIC. It will also help to create the conditions for Ethiopian and Eritrean disengagement from Somalia.

The deployment of IGASOM is only one of the critical elements, however, of what must be a comprehensive plan to reach a durable solution in Somalia.

A political settlement is needed, and dialogue toward it must resume. A security protocol, including a verifiable ceasefire and military disengagement, is the next step toward a longer-term solution.

The international community must be united in its efforts to bring the parties back to this dialogue.

The United States welcomes the recommendations of the United Nations Somalia Monitoring Group regarding ways to strengthen and improve the effectiveness of the United Nations' arms embargo on Somalia.

We continue to work with our partners in the Security Council on these and many other issues as we seek a solution to the Somalia crisis.

> In Resolution 1724, adopted on the same date, the Security Council "condemn[ed] the significant increase in the flow of weapons and ammunition supplies to and through Somalia, which constitutes a violation of the arms embargo and a serious threat to peace and stability in Somalia." Acting under Chapter VII, the Security Council "stress[ed] the obligation of all Member States to comply fully" with the arms

embargo established by Resolution 733 (1992) and provided for the re-establishment for six months of "the Monitoring Group referred to in paragraph 3 of resolution 1558 (2004)" with a mandate to monitor compliance and investigation violations of the arms embargo and make recommendations based on its investigations and enumerated reports, and to "work closely with the Committee [established pursuant to resolution 751 (1992)] on specific recommendations for additional measures to improve overall compliance with the arms embargo." The mandate is set forth in paragraph 3(a)-(i).

3. Sudan

See discussion of issues related to peacekeeping forces in Darfur in A.4. *supra.*

4. Western Sahara

On October 31, 2006, the United States voted in favor of Security Council Resolution 1720 renewing the mandate for the UN Mission for the Referendum in Western Africa ("MINURSO"). In doing so, however, the United States expressed its reservations about the continued existence of MINURSO and stated that it agreed to the renewal "with the understanding that all parties will use the next six months to aggressively negotiate a mutually acceptable solution that brings peace, stability, and economic prosperity to the region in a manner consistent with the principle of self-determination for the people of Western Sahara." The full text of the U.S. explanation of vote, delivered by William Brencick, Minister Counselor for Political Affairs, and excerpted below is available at *www.un.int/usa/06_310.htm*.

* * * *

The United States remains concerned that the Western Sahara conflict has impeded regional integration and development for

the last thirty years. A lasting resolution is now long overdue. Unresolved, this humanitarian crisis leaves the Sahrawi people with a bleak and uncertain future. Further deterioration has the potential to worsen their hardship and could threaten political and economic progress made in Algeria and Morocco.

While we cannot impose a solution, we call on all parties to engage the United Nations and each other in a spirit of flexibility and compromise. In particular, we urge Morocco to move quickly to fulfill its many promises to table a comprehensive and credible autonomy proposal for the Western Sahara. We also urge Morocco to engage seriously in discussions with all Sahrawi people, including the Polisario. These discussions, without a predetermined agenda, could form the basis for a new UN-led negotiating process.

Our hope, Mr. President, is based on faith that all parties exert the leadership and willingness necessary to improve their collective future and solve this dispute. MINURSO is not a viable alternative to a permanent solution, and we therefore call on Morocco, Algeria, and the Polisario to move beyond rhetoric to the serious work needed for a resolution of this conflict. In practical terms, we also call on the Secretary-General to examine the mechanisms and timetable for the dismantlement of MINURSO should MINURSO continue to prove ineffective in fulfilling its mandate or the concerned parties prove unable to make substantial progress towards a political solution.

5. Code of Conduct

On February 23, 2006, Ambassador Bolton delivered a statement to the Security Council entitled "Sexual Exploitation and Abuse at the Hands of UN Peacekeepers: Translating Outrage into Action." The full text of Ambassador Bolton's statement, excerpted below, is available at *www.un.int/usa/06_035.htm*. *See also* Statement by Ambassador Jackie W. Sanders, Alternate U.S. Representative to the UN for Special Political Affairs, on the report of the Secretary-General on children and armed conflict, in the Security Council, November 28, 2006, available at *www.un.int/usa/06_368.htm*.

. . . It is absolutely unacceptable that horrific crimes of sexual abuse and exploitation have been committed by UN peacekeepers against individuals they have been assigned to protect. Having an open briefing on this subject is important because, while we rightly express our moral outrage, we must take firm and decisive action. We must take action now not only to pursue justice and a resolution to the crimes that have already been committed, but to establish the necessary institutions, mechanisms, training, and oversight procedures to ensure they are not repeated in existing and future peacekeeping operations. We cannot wait months and years while more children are exploited and the reputation of UN peacekeepers continues to decline.

* * * *

The United States for its part takes its responsibility as a member state seriously in this regard. We are working closely with others to finalize language in the new, amended Memorandum of Understanding issued by[the UN Department of Peacekeeping Operations ("DPKO")] last fall and encourage other Troop Contributing Countries (TCCs) to do so as well. The United States Congress has expressed keen interest in this matter and has taken action. In 2005, Congress passed and President Bush signed the 2005 reauthorization of the Trafficking Victims Protection ACT (TVPRA) of 2000. This new legislation requires the executive branch, starting in June 2006 to report annually to the U.S. Congress on the actions taken by the United Nations and other international organizations to prevent trafficking and sexual exploitation and abuse by employees, contractors, and peacekeeping forces. It also requires the Secretary of State to report to the U.S. Congress on the effectiveness of these actions prior to voting on any new or reauthorized peacekeeping mission.

The U.S. Government has also taken action on an important matter closely linked to the problem of sexual exploitation and abuse at the hands of peacekeepers—the spread of HIV. We have fully supported and will continue to support Security Council Resolution 1308. The U.S. Department of Defense, and more recently the President's Emergency Plan for AIDS Relief, have provided resources and technical assistance to implement long-term

strategies for HIV/AIDS education, prevention, counseling, testing, and treatment in more than 70 military and peacekeeping populations around the world. . . .

We strongly endorse the recommendations of the UN General Assembly's Special Committee on Peacekeeping to strengthen enforcement of a uniform UN code of conduct for peacekeepers, improve the capacity of the UN—in cooperation with troop contributing countries—to investigate allegations of sexual exploitation and abuse, establish assistance to and compensation for victims, and enhance pre- and post-deployment training for UN peacekeepers. We also welcome the creation of personal conduct units within the UN Missions in Burundi, Cote d'Ivoire, the Democratic Republic of Congo, East Timor, Haiti, Liberia, Sierra Leone, and Sudan to address allegations and to assist victims. We feel it is critical that all U.N. Missions adopt similar units in each of their respective fields. We will strongly encourage other UN Security Council members to continue to support the inclusion in UNSC resolutions establishing peacekeeping operations specific and strong language to this end. Finally, we take special note of DPKO's efforts to increase the participation of female uniformed personnel serving in UN peacekeeping operations.

We are concerned, though, about the status and progress of the investigations into past cases of abuse. We understand that the Office of Internal Oversight Services (OIOS) took over all investigations as of last October and is expected to issue a report this May. We expect that DPKO will cooperate fully with OIOS in its investigations of past abuses and in providing access to all information on new allegations as they surface. We know this is a daunting task and that OIOS has only begun to scratch the surface of this problem. To date the UN has investigated 295 personnel resulting in 137 repatriations and 16 dismissals of soldiers, commanders, police and UN staff. It is also critical that OIOS operate with complete autonomy to investigate these matters. . . .

All of these vitally needed reforms by the UN must also be matched by resolve on the part of troop contributing countries to prevent and punish crimes by their personnel who participate in UN peacekeeping missions. Pre- and post-deployment training compliance, adequate living standards for troops, discipline, and

compensation for victims requires commitment and action by troop contributing countries.

* * * *

Cross References

Establishment of tribunal in Lebanon, **Chapter 3.C.1.d.**
Special sessions concerning Israel at the Human Rights Council, **Chapter 6.A.2.b. 1. and (2)(i)**
Executive branch statements on the occurrence of genocide in Darfur, **Chapter 6.A.2.b.(2)(iii) and G.**
Middle East peace process, **Chapter 9.B.2.**
U.S. sanctions related to role of Hamas in Palestinian Authority, **Chapter 16.A.5.**

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. U.S. Response to International Committee of the Red Cross Study on Customary International Humanitarian Law

In March 2005 the International Committee of the Red Cross ("ICRC") published the results of a study initiated in 1995 of customary international humanitarian law. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005. On November 3, 2006, John B. Bellinger, III, Legal Adviser of the Department of State and William J. Haynes II, General Counsel of the Department of Defense, provided an initial response by the United States to the study in a letter to ICRC President Dr. Jakob Kellenberger. The letter, set forth below, and attachment, "Illustrative Comments on Specific Rules in the Customary International Humanitarian Law Study," are available in full at *www.state.gov/s/l/c8183.htm*.

We write to provide the U.S. Government's initial reactions to the ICRC's recent study, entitled Customary International Humanitarian Law (the "Study").

We welcome the Study's discussion of this complex and important subject of the customary "international humanitarian law,"

18-Cummins-Chap18.indd 1069 10/22/07 11:50:10 PM

and we appreciate the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material. We share the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC. Although the Study uses the term "international humanitarian law," we prefer the "law of war" or the "laws and customs of war." (fn. omitted)

Given the Study's large scope, we have not yet been able to complete a detailed review of its conclusions. We recognize that a significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or—as with many provisions derived from the Hague Regulations of 1907—customary law. Nonetheless, it is important to make clear—both to you and to the greater international community—that, based upon our review thus far, we are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.

We will continue our review and expect to provide additional comments or otherwise make our views known in due course. In the meantime, we thought it would be constructive to outline some of our basic methodological concerns and, by examining a few of the rules set forth in the Study, to illustrate how these flaws call into question some of the Study's conclusions.

This is not intended to suggest that each of our methodological concerns applies to each of the Study's rules, or that we disagree with every single rule contained in the study—particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict. Rather, we hope to underline by our analysis the importance of stating rules of customary international law correctly and precisely, and of supporting conclusions that particular rules apply in international armed conflict, internal armed conflict, or both. For this reason, the specific analysis

that follows this letter is in certain respects quite technical in its evaluation of both the proffered rule and the evidence that the Study uses to support the rule.

There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Although it is appropriate for commentators to advance their views concerning particular areas of customary international law, it is ultimately the methodology and the underlying evidence on which commentators rely—which must in all events relate to State practice—that must be assessed in evaluating their conclusions.

State practice. Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the "extensive and virtually uniform" standard generally required to demonstrate the existence of a customary rule.
- Second, we are troubled by the type of practice on which the Study has, in too many places, relied. Our initial review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. We also are troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.

- Third, the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.
- Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties,[2] that practice is in important instances given inadequate weight.
- Finally, the Study often fails to pay due regard to the practice of specially affected States.[3] A distinct but related point

[2] Study, Vol. I, p. xliv (indicating that contrary practice by States not parties to treaties that contain provisions similar to the rule asserted "has been considered as important negative evidence").

[3] As the Study notes (Vol. I, p. xxxviii), the International Court of Justice has observed that "an indispensable requirement" of customary international law is that "State practice, *including that of States whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, [1969] I.C.J. 4, 43 (emphasis added). In this context, the Study asserts, this principle means that "[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are 'specially affected' when their practice examined for a certain rule was relevant to that armed conflict." Study, Vol. I, p. xxxix. This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every State that has participated in an armed conflict is "specially affected"; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as "specially affected." Moreover, those States are not simply "specially affected" when their practice has, in fact, been examined and found relevant by the ICRC. Instead, specially affected States generate practice that *must* be examined in order to reach an informed conclusion regarding the status of a potential rule. As one member of the Study's Steering Committee has written, "The practice of 'specially affected states' – such as nuclear powers, other major military powers, and occupying and occupied states – which have a track record of statements, practice and policy, remains particularly telling." Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 Am. J. Int'l L. 238, 249 (1996).

18-Cummins-Chap18.indd 1072 10/22/07 11:50:11 PM

> is that the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

Opinio juris. We also have concerns about the Study's approach to the *opinio juris* requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words [Study, Vol. I, p. xl.],

> it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction. . . . When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. (fn. omitted)

We do not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, we do not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols ["AP"] I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time. One therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly *inter se*, and not in contemplation of

independently binding customary international law norms.[5] Even if one were to accept the merger of these distinct requirements, the Study fails to articulate or apply any test for determining when state practice is "sufficiently dense" so as to excuse the failure to substantiate *opinio juris*, and offers few examples of evidence that might even conceivably satisfy that burden.

We are troubled by the Study's heavy reliance on military manuals. We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts. Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts. Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question.

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as

[5] Even universal adherence to a treaty does not necessarily mean that the treaty's provisions have become customary international law, since such adherence may have been motivated by the belief that, absent the treaty, no rule applied.

easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules. In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

Formulation of rules. The Study contains several other flaws in the formulation of the rules and the commentary. Perhaps most important, the Study tends to over-simplify rules that are complex and nuanced. Thus, many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions. Although the Study's commentary purports to explain and expand upon the specifics of binding customary international law, it sometimes does so by drawing upon non-binding recommendations in human rights instruments, without commenting on their non-binding nature, to fill perceived gaps in the customary law and to help interpret terms in the law of war. For this reason, the commentary often compounds rather than resolves the difficulties presented by the rules, and it would have been useful for the Study's authors to articulate the weight they intended readers to give the commentary.

Implications. By focusing in greater detail on several specific rules, the attachment illustrates how the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes. These flaws also contribute to two more general errors in the Study that are of particular concern to the United States:

- First, the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States (including the United States and a number of other States that have been involved in armed

conflict since the Protocols entered into force) that have declined to become a party to those Protocols; and

- Second, the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions.

We would like to reiterate our appreciation for the ICRC's continued efforts in this important area, and hope that the material provided in this letter and in the attachment will initiate a constructive, in-depth dialogue with the ICRC and others on the subject.

As indicated, "Illustrative Comments on Specific Rules in the Customary International Humanitarian Law Study," accompanied the letter. The attachment provided a detailed analysis of four rules, as examples, that the United States did not believe reflect customary international law, at least as stated. A closing observation to the attachment explained:

> We have selected these rules from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns.

Excerpts below from the attachment provide the summary for each of the four rules and the complete analysis of Rule 45. The full text of the attachment is available, with the cover letter, at *www.state.gov/s/l/c8183.htm*.

Rule 31

Rule 31 states: "Humanitarian relief personnel must be respected and protected."

* * * *

Summary. We do not believe that rule 31, as drafted, reflects customary international law applicable to international or non-international armed conflicts. The rule does not reflect the important element of State consent or the fact that States' obligations in this area extend only to [humanitarian relief personnel] HRP who are acting within the terms of their mission—that is, providing humanitarian relief. To the extent that the authors intended to imply a "terms of mission" requirement in the rule, the authors illustrated the difficulty of proposing rules of customary international law that have been simplified as compared to the corresponding treaty rules.

Rule 45

The first sentence of rule 45 states: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited."

Protection of the environment during armed conflict obviously is desirable as a matter of policy, for reasons that include issues of civilian health, economic welfare, and ecology. The following discussion should not be interpreted as opposing general consideration, when appropriate and as a matter of policy, of the possible environmental implications of an attack. Additionally, it is clear under the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.

Nevertheless, the Study fails to demonstrate that rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons.[27] First, the Study fails to assess accurately the practice of specially affected States, which clearly have expressed their view that any obligations akin to those contained in rule 45 flow from treaty commitments, not from customary international law. (We disagree with the Study's conclusion that France,

[27] This discussion focuses on only the first sentence in rule 45.

the United Kingdom, and the United States are not among those specially affected with regard to environmental damage flowing from the use of conventional weapons, given the depth of practice of these States as a result of their participation in a significant proportion of major international armed conflicts and peacekeeping operations around the globe during the twentieth century and to the present.) Second, the Study misconstrues or overstates some of the State practice it cites. Third, the Study examines only limited operational practice in this area and draws flawed conclusions from it.

Specially affected States. The Study recognizes that the practice of specially affected States should weigh more heavily when assessing the density of State practice,[28] but fails to assess that practice carefully. France and the United States repeatedly have declared that Articles 35(3) and 55 of AP I, from which the Study derives the first sentence of rule 45, do not reflect customary international law. In their instruments of ratification of the 1980 [Convention on Certain Conventional Weapons ("CCW")], both France and the United States asserted that the preambular paragraph in the CCW treaty, which refers to the substance of Articles 35(3) and 55, applied only to States that have accepted those articles.[29] The U.S. State Department Principal Deputy Legal Adviser stated during a conference in 1987 that the United States considered Articles 35 and 55 to be overly broad and ambiguous and "not a part of customary law."[30] Rather than taking serious account of such submissions, the Study instead places weight on evidence of far less probative value. The U.S. Army JAG Corps Operational Law Handbook, which the Study cites for the proposition that the United States believes that the provision in

[28] Study, Vol. I, p. xxxviii.

[29] The Study includes these statements in Vol. II, p. 878, paras. 152 and 153.

[30] Remarks of Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. and Pol'y 424, 436 (1987). One of the U.S. concerns has been that Articles 35(3) and 55 fail to acknowledge that use of such weapons is prohibited only if their use is clearly excessive in relation to the concrete and direct overall military advantage anticipated. The Study purposefully disregards this objection, even as to the contours of

18-Cummins-Chap18.indd 1078 10/22/07 11:50:12 PM

rule 45 is binding, is simply an instructional publication and is not and was not intended to be an authoritative statement of U.S. policy and practice.[31] Nor is the U.S. Air Force Commander's Handbook, which the Study also cites as authority.[32]

In addition to maintaining that Articles 35(3) and 55 are not customary international law with regard to the use of weapons generally, specially affected States possessing nuclear weapon capabilities have asserted repeatedly that these articles do not apply to the use of nuclear weapons. For instance, certain specially affected States such as the United States, the United Kingdom, Russia, and France so argued in submissions to the International Court of Justice ("ICJ").[33] The United Kingdom's military manual

---

the customary rule. As the commentary states, "[T]his rule is absolute. If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, it is not relevant to inquire into whether this behaviour or result could be justified on the basis of military necessity or whether incidental damage was excessive." Study, Vol. I, p. 157.

An example illustrates why States – particularly those not party to AP I – are unlikely to have supported rule 45. Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A's imminent launch, and knows that such a launch itself would cause environmental devastation. Indeed, one of the Study's authors has recognized elsewhere that the value of the military objective is relevant to an analysis of when an attack that will cause harm to the environment is permitted. *See* L. Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 316 IRRC 35, 52 (1997).

[31] Study, Vol. II, p. 883, para. 186.

[32] Study, Vol. II, p. 882-83, para. 185.

[33] Letter dated June 20, 1995 from the Acting Legal Adviser of the Department of State, together with the Written Statement of the Government of the United States, p. 25-28; Letter dated June 16, 1995 from the Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Statement of the Government of the United Kingdom, p. 40-46; Letter dated June 19, 1995 from the Ambassador of the Russian Federation, together with Written Statement of the Government of Russia, p. 10-11; Lettre en date du 20 juin 1995 du Ministre des affaires étrangères de la République française, accompaignée de l'exposé écrit du Gouvernement de la République française, p. 31-33.

specifically excepts from the limitation in Article 35(3) the use of nuclear weapons against military objectives.[34] In a report summarizing the Conference that drafted Additional Protocol I, the United States noted:

> During the course of the Conference there was no consideration of the issues raised by the use of nuclear weapons. Although there are several articles that could seem to raise questions with respect to the use of nuclear weapons, most clearly, article 55 on the protection of the natural environment, it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the new rules established by the Protocol were not intended to have any effects on, and do not regulate or prohibit the use of nuclear weapons. We made this understanding several times during the Conference, and it was also stated explicitly by the British and French Delegations. It was not contradicted by any delegation so far as we are aware.[35]

The Conference Record from 1974, reflecting earlier work on the text that became AP I, records the United Kingdom's view on the issue: "[The UK] delegation also endorsed the ICRC's view, expressed in the Introduction to the draft Protocols, that they were not intended to broach problems concerned with atomic, bacteriological or chemical warfare. . . . It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols."[36] In acceding to AP I, both France and the United Kingdom stated that it continued to be their understanding that the Protocol did not apply generally to

[34] Study, Vol. II, p. 882, para. 184.

[35] Digest of U.S. Practice, 1977, p. 919.

[36] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 5-6 (1977), p. 134.

18-Cummins-Chap18.indd 1080 10/22/07 11:50:12 PM

nuclear weapons. For instance, the United Kingdom stated, "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons. . . . In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons."[37]

The Study's summary states: "It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons."[38] However, the weight of the evidence—including the fact that ICRC statements prior to and upon conclusion of the Diplomatic Conference acknowledged this as a limiting condition for promulgation of new rules at the Conference; that specially affected States lodged these objections from the time the rule first was articulated; and that these States have made them consistently since then—clearly indicates that these three States are not simply persistent objectors, but rather that the rule has not formed into a customary rule at all.

General evidence of State practice and opinio juris. Other practice included in the Study fails to support or undercuts the customary nature of rule 45. This includes examples of States consenting to the application of Articles 35(3) and 55;[39] a State expressing a concern that opposing forces were directing attacks against its chemical plants, without asserting that such attacks would be unlawful;[40] the ICJ indicating in 1996 that Article 35(3) constrained those States that subscribed to AP I, and thus indicating that the Article is not customary international law;[41] draft codes

[37] Statement of the United Kingdom, January 28, 1998, revised July 2, 2002. See also statement of France, April 11, 2001.

[38] We note that the Study raises doubts about the continued validity of the "persistent objector" doctrine. Study, Vol. I, p. xxxix. The U.S. Government believes that the doctrine remains valid.

[39] Study, Vol. II, p. 879, paras. 157 and 158.

[40] Study, Vol. II, p. 887-88, paras. 224 and 225. *See also* p. 900, para. 280 (CSCE committee drew attention to shelling that could result in harm to the environment, without indicating that such attacks were unlawful).

[41] Study, Vol. II, p. 900-01, para. 282.

and guidelines issued by international organizations and not binding by their terms;[42] and statements that could just as easily be motivated by politics as by a sense of legal obligation. Some cited practice makes specific reference to a treaty as the basis for obligations in this area. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, the United States and Jordan stated that Article 55 of AP I requires States Parties to "take care in warfare to protect the natural environment against widespread, long-term and severe damage." That is, the United States and Jordan described the rule as a treaty-based, rather than customary, obligation.[43] Israel's Practice Report, which states that Israeli Defense Forces do not use or condone methods or means of warfare that rule 45 covers, contains no suggestion that Israel has adopted this policy out of a sense of legal obligation.[44] With regard to the twenty State military manuals the Study cites (all but one of which are from States Parties to AP I), the Study offers no evidence that any of these nineteen States Parties included such a provision in their manuals out of a sense of *opinio juris*, rather than on the basis of a treaty obligation. In sum, none of the examples given clearly illustrates unequivocal support for the rule, either in the form of State practice or of *opinio juris*.

Domestic criminal laws. The Study lists various States' domestic criminal laws on environmental damage, but some of those laws flow from the obligation in Article 85 of AP I to repress breaches of the Protocol. Certain other States' laws criminalize a broad crime termed "ecocide," but most of the cited provisions fail to make clear whether this crime would apply to acts taken in connection with the use of military force. As noted above, a number of States (including Australia, Burundi, Canada, Congo, Georgia, Germany, Netherlands, New Zealand, Trinidad, and the United Kingdom) have incorporated ICC Article 8(2)(b)(iv) into their criminal codes, but the ICC provision prohibits the use of the weapons

[42] Study, Vol. II, p. 878 (para. 156), p. 879 (para. 160), p. 898 (paras. 273 and 274), p. 898-99 (para. 275), and p. 902 (para. 289).

[43] Study, Vol. II, p. 891, para. 244.

[44] Study, Vol. II, p. 890, para. 241.

described in rule 45 only in those cases in which their use "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[45] These domestic criminal provisions clearly do not support the broader statement in rule 45, which would preclude States from taking into account the principles of military necessity and proportionality. Finally, the Study offers almost no evidence that any of these States has enacted criminal laws prohibiting this activity out of a sense of *opinio juris*. The fact that a State recently criminalized an act does not necessarily indicate that the act previously was prohibited by customary international law; indeed, a State may have criminalized the act precisely because, prior to its criminalization in domestic law, it either was not banned or was inadequately regulated.

Operational practice. The Study examines only a limited number of recent examples of practice in military operations and draws from these examples the conclusion that "[p]ractice, as far as methods of warfare . . . are concerned, shows a widespread, representative and virtually uniform acceptance of the customary law nature of the rule found in Articles 35(3) and 55(1)" of AP I.[46] However, the cited examples are inapposite, as none exhibited the degree of environmental damage that would have brought rule 45 into play. Rather than drawing from that the conclusion that the underlying treaty provisions on which the rule is based are too broad and ambiguous to serve as a useful guideline for States, as the United States long has asserted, the Study assumes that the failure to violate the rule means that States believe it to be customary law. It is notable that, following Iraq's attacks on Kuwait's oil fields, most international criticism focused on the fact that these attacks violated the doctrines of military necessity and proportionality.[47] Most criticism did not assert potential violations of customary

[45] Rome Statute of the International Criminal Court, Article 8(2)(b)(iv).

[46] Study, Vol. I, p. 154.

[47] *See* Yoram Dinstein, *Protection of the Environment in International Armed Conflict*, 5 Max Planck UNYB 523, 543-46 and notes (2001) (discussing the illegality of Iraq's acts but noting that "many scholars have adhered to the view that—while the damage caused by Iraq was undeniably widespread and severe—the 'long term' test (measured in decades) was not satisfied").

rules pertaining to environmental damage along the lines of rule 45.[48] The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia noted that "it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions [of AP I], even assuming they were applicable."[49] It may be the case that rule 45 as drafted, like the treaty provisions on which it is based, sets such a limited and imprecise boundary on action as not to function as a rule at all.

Non-international armed conflicts. For all of the reasons that the Study fails to offer sufficient evidence that the provision in rule 45 is a customary rule in international armed conflict, the Study fails to make an adequate case that the rule is customary international law applicable to non-international armed conflicts. (The Study itself acknowledges that the case that rule 45 would apply in non-international conflicts is weaker.[50]) The fact that a proposal by Australia to include a provision like Article 35(3) in AP II failed further undercuts the idea that rule 45 represents a rule of customary international law in non-international armed conflicts.[51]

Summary. States have many reasons to condemn environmental destruction, and many reasons to take environmental considerations into account when determining which military objectives to pursue. For the reasons stated, however, the Study has offered insufficient support for the conclusion that rule 45 is a rule of customary international law with regard to conventional or nuclear weapons, in either international or non-international armed conflict.

---

[48] These attacks, of course, violated provisions of the law of armed conflict, particularly those relating to military necessity. The U.S. Government, in concurring in the opinion of the conference of international experts, convened in Ottawa, Canada from July 9-12, 1991, found that Iraq's actions violated, among other provisions, Article 23(g) of the Annex to the 1907 Hague Convention IV and Article 147 of the Fourth Geneva Convention. *See* Letter dated March 19, 1993 From the Deputy Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/25441, p. 15.

[49] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), para. 15.

[50] Study, Vol. I, p. 156-57.

[51] Study, Vol. II, pp. 877-78, para. 150.

Rule 78

Rule 78 states: "The anti-personnel use of bullets which explode within the human body is prohibited."

* * * *

Summary. Virtually none of the evidence of practice cited in support of rule 78 represents operational practice; the Study ignores contrary practice; and the Study provides little evidence of relevant *opinio juris*. The evidence in the Study of restrictions on the use of exploding bullets supports various narrower rules, not the broad, unqualified rule proffered by the Study. Thus, the assertion that rule 78 represents customary international law applicable in international and non-international armed conflict is not tenable.

Rule 157

Rule 157 states: "States have the right to vest universal jurisdiction in their national courts over war crimes."

* * * *

Summary. The State practice cited is insufficient to support a conclusion that the broad proposition suggested by rule 157 has become customary: examples of operational practice are limited to a handful of instances; a significant number of the examples do not support the rule; and the cited practice utilizes definitions of "war crimes" too divergent to be considered "both extensive and virtually uniform."[1] Moreover, the Study offers limited evidence of *opinio juris* to support the claim that rule 157 is customary.

2. Convention on Conventional Weapons

a. Third Review Conference

The United States participated in the Third Review Conference of the States Parties to the Convention on Certain Conventional Weapons ("CCW") in Geneva from November 7-17, 2006.

[1] North Sea Continental Shelf Cases, [1969] I.C.J. Reports at 43.

As explained by a media note released by the Department of State Office of the Spokesman on November 3, 2006, the conference was to "review the operation of the Convention's protocols, welcome the entry into force of a new protocol on explosive remnants of war, and consider new restrictions on anti-vehicle landmines." The full text of the media note is available at *www.usmission.ch/ccw/110706MediaNote.html.*

In his opening statement on November 7, Ronald Bettauer, Deputy Legal Adviser of the U.S. Department of State, and head of the U.S. delegation, focused his remarks on explosive remnants of war ("ERW"), addressed by Protocol V to the CCW, and on the continued need for a protocol addressing anti-vehicle mines. Mr. Bettauer noted that he had led the U.S. delegation to the 1974 Lucerne Conference of Government Experts that began the work that resulted in the Convention on Certain Conventional Weapons and its protocols. The full text of Mr. Bettauer's remarks is available at *www.usmission.ch/ccw/110706Bettauer.html. See also* "The Case for New Restrictions on the Use of Anti-Vehicle Mines," a fact sheet released by the Bureau of Political-Military Affairs, U.S. Department of State on November 3, 2006, available at *www.usmission.ch/ccw/1103FactSheet.html.*

---

* * * *

I want to make a brief comment on explosive remnants of war. Let me say that we are pleased that Protocol V to the CCW, which can help reduce the humanitarian risk to civilians in the aftermath of conflict, is entering into force. When this protocol is widely adhered to and implemented, it should go a long way toward mitigating the suffering and injury caused by explosive remnants of war. If states follow the guidance contained in the Protocol's technical annex, this will help reduce the creation of ERW in the first place by improving the reliability of munitions. Further, we are grateful to Professor McCormack for his thoughtful report, and to the states that responded to his questionnaire, permitting him to assess the state of the law of war with regard to critical issues like targeting and proportionality. The United States believes that CCW states

parties have considered the issue of ERW in a careful and comprehensive way across a broad range of weapons systems. The law in the field has been shown to be adequate.

Yesterday the ICRC released a press statement calling for a new agreement to address the problem of cluster munitions. While we share the ICRC's abiding interest in humanitarian goals, we believe that the best way for states to achieve this goal now is to apply the law rigorously, not to begin talking about new rules at a time when Protocol V is just coming into effect. Rather than continue government experts' discussion of the issue at this time, let us look to the first conference that may be convened by states parties to the ERW protocol as the proper venue to begin to review the operation and implementation of that protocol's provisions.

I turn now to what the United States considers the most important topic at this conference—indeed what will be the measure of the Review Conference's success or failure—anti-vehicle mines.

Anti-vehicle mines were discussed as a distinct subset of landmines during the negotiation of the Amended Mines Protocol in 1995 and 1996. In 1995, the United States and Denmark proposed that CCW States Parties adopt restrictions on the use of not only anti-personnel landmines but also other landmines—that is, anti-vehicle mines. Thus was born the phrase "mines other than anti-personnel mines" and the acronym "MOTAPM." Although the U.S.-Danish proposal formed the basis for the Amended Mines Protocol, the amended protocol ultimately did not include the rigorous restrictions on anti-vehicle mines because of lack of consensus.

The MOTAPM discussions since 2001 have provided an opportunity to determine whether issues that remained unresolved in 1996 can be resolved now, including by taking advantage of improvements in technology and practices. You may recall that developing appropriate restrictions on the use of anti-vehicle mines has been the most important issue for the United States, and for many other countries, at most of the CCW meetings since 2001. We and the other countries that co-sponsored the original proposal were persuaded that these mines posed a real humanitarian threat to civilians and that it would be possible to achieve consensus on regulation of their use consistent with all legitimate military interests.

As I noted earlier, landmines were discussed in 1974 as a potential issue because of the possibility that civilians might activate them. The original Mines Protocol, adopted over 26 years ago, has many elements familiar to our discussions of the past five years on MOTAPM. There are the requirements for an "effective neutralizing mechanism" and for restrictions to ensure that mines did not continue to pose a threat to civilians when their military purpose is no longer being served. And even a cursory reading of the Amended Mines Protocol and the Coordinator's paper demonstrates a substantial degree of congruence. Since these elements are by now so familiar, it should not be difficult for governments to appreciate that they should be applied to anti-vehicle mines.

After 32 years of discussion about landmines, after 26 years since the original Mines Protocol was adopted, and after working on the anti-vehicle mine problem intensively for the last 5 years, it is time to find consensus or to admit that we cannot find it. . . .

* * * *

Despite the U.S. preference for the original 30-nation text or the Reimaa text, we have worked very hard to develop compromise options that could satisfy the various concerns that have been expressed. These options, while perhaps not optimal for any one state, could become the basis for consensus. The approach of incorporating certain key provisions on detectability and active life in optional annexes, which is reflected in option 2 in the document that Ambassador Paranhos put forward in September, seems to my delegation a possible basis for consensus. It would give those governments that insist on strong, binding legal restrictions on these mines a way to have them. But it would also afford those governments not prepared to accept such restrictions an avenue to adopt the other provisions of the protocol without any onus, and they could consider in the future whether they are in a position to agree to more. It would, if adopted, constitute a positive contribution to improving protections under the law of war, since even states that do not accept the optional annexes would be bound by provisions on cooperation and by transfer restrictions. Moreover, those states that are willing to be bound by the provisions on detectability and active life would have accepted strong, new obligations.

This compromise approach mirrors the mechanism of the CCW itself, where a different number of states are parties to each of its protocols and only 18 states so far are parties to all five protocols. The optional annex approach appears to be the only way to reconcile the different perspectives to the MOTAPM protocol that we now confront. We should consolidate our advances thus far to make this Review Conference a true success.

On November 16, 2006, Mr. Bettauer released a press statement, stating that on the following day "the United States, Australia, Denmark, and a number of other like-minded countries will announce policies to reduce the humanitarian impact of anti-vehicle mines" in a Declaration on Anti-Vehicle Mines. Excerpts from Mr. Bettauer's press statement, including the text of the declaration, follow. The full text of the press statement is available at *www.usmission.ch/Press2006/1116Motapm.html.*

* * * *

We regret that this Review Conference was not in a position to adopt by consensus a new protocol containing legally binding commitments on anti-vehicle mines.

However, the United States, like other states that have made this declaration, believes that this should not prevent individual governments from implementing concrete steps that can avert unnecessary civilian suffering and help accelerate the flow of humanitarian relief after armed conflict.

The United States remains committed to achieving an Anti-Vehicle Mines Protocol within the CCW treaty framework. We hope that circumstances will change in the future, and that it will be possible for governments to join in renewed efforts to adopt a protocol, building on the work done over the past five years.

The following is the text of the Declaration on Anti-Vehicle Mines:

Declaration on Anti-Vehicle Mines

Each of our governments regrets that the Review Conference of the Convention on Certain Conventional Weapons (CCW) was not in the position to adopt by consensus a new protocol containing

legally-binding commitments with respect to mines other than anti-personnel mines as defined in the Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (referred to as "MOTAPM" or anti-vehicle mines).

In view of its concern about the humanitarian impact of these weapons, each of our governments intends to take necessary steps to adopt the following practices as a matter of national policy:

- ***not to use any anti-vehicle mine outside of a perimeter-marked area if that mine is not detectable.*** A detectable mine is a mine that provides, upon emplacement, a response signal equivalent to a signal from eight grammes or more of iron in a single coherent mass buried five centimetres beneath the ground and can be detected by commonly-available technical mine detection equipment. A perimeter-marked area is an area that, in order to ensure the effective exclusion of civilians, is monitored by military or other authorized personnel, or protected by fencing or other means.
- ***not to use any anti-vehicle mine outside of a perimeter-marked area that does not incorporate a self-destruction or self-neutralization mechanism*** that is designed and constructed so that no more than ten percent of activated mines fails to self-destruct within forty-five days after arming; and not to use any anti-vehicle mine outside a perimeter-marked area unless it also incorporates a back-up self-deactivation feature that is designed and constructed so that, in combination with the self-destruction or self-neutralization mechanism, no more than one in one thousand activated mines functions as a mine one hundred twenty days after arming.
- ***to prevent the transfer of any anti-vehicle mine*** (a) to any recipient other than a State or State agency authorized to receive it; (b) if it does not meet the detectability and active life standards set out in this declaration, except for the purpose of destruction or for development of and training in mine detection, mine clearance, or mine destruction techniques; (c) to any State that has not stated the same policy

that is set out in this declaration; and (d) without an end-user certificate.

These practices will be followed to the extent that each government deciding to take these steps does not already have in place more stringent practices to protect civilians from the potential impact of these weapons.

If circumstances change in the future, and it appears possible that consensus may be achieved on a protocol on anti-vehicle mines, each of our governments intends to join other governments in renewed efforts to adopt such a protocol, building on the work done on this subject over the last five years by the CCW coordinators.

Each of our governments encourages all States that have not announced an intention to apply the policies set out in this declaration to do so as promptly as possible.

In remarks to the closing plenary session of the conference on November 17, 2006, the day the declaration was released, Mr. Bettauer stated that 25 states had "joined in stating this policy" set forth in the Declaration on Anti-Vehicle Landmines. Further excerpts follow from Mr. Bettauer's closing remarks; the full text is available at *www.usmission.ch/Press2006/1117CCWClosing.html.*

---

* * * *

. . . This policy will be of immediate humanitarian benefit. It will ensure that the states that join it make any anti-vehicle landmine detectable, limit their active life, and have restrictions on transfer in accordance with the stated terms of the policy. We think this is very important. But, as we have made clear to our colleagues at this meeting, it is not the end of the road for us, or for any of the others who have joined in this policy. We would like to see a protocol negotiated. We stand ready, if positions change, and consensus appears possible, to restart the work and to achieve agreement in the CCW framework on a new protocol dealing with anti-vehicle landmines. We would begin the work based on the work already done over the past five years.

My delegation is also pleased at the entry into force of Protocol V on Explosive Remnants of War. We have submitted this protocol to our Senate for advice and consent and we intend to press vigorously to achieve U.S. adherence as quickly as possible. In this connection, we previously had taken the position that Protocol V and the strict implementation of international humanitarian law was sufficient to deal with ERW issues, including cluster munitions. But cluster munitions and all explosive remnants of war are clearly a humanitarian concern. We therefore were ready to work with the other delegations to find a way to address explosive remnants of war meaningfully during the next year, with principal focus on cluster munitions. The mandate that has been adopted for a meeting of governmental experts that will occur in June is appropriate in scope and will provide for serious work on this issue. The United States intends to participate vigorously and seriously in this work to see that there is a common understanding of the risks and dangers, and to do all we can to clarify the issue and come up with a reasonable report for the next meeting of States Parties.

In this connection, I should say that the United States government was disappointed at the announcement made both in Oslo and today at this conference of a separate meeting outside the CCW framework to negotiate an agreement concerning cluster munitions. While recognizing that this is an important humanitarian issue, we should deal with cluster munitions inside the current framework, the framework of the CCW. The effort to go outside this framework is not healthy for the CCW, it is not healthy for the development of widely adhered to rules of international humanitarian law. One can compare our reaction to the failure to adopt a consensus protocol on MOTAPM. We did not seek to go outside the CCW framework and adopt a protocol with like-minded states. Rather we have, as a national policy, avowed our intention to negotiate an anti-vehicle mine protocol in the CCW framework when that is possible. . . .

. . . The CCW takes into account both military and humanitarian considerations in the interest of preventing potential indiscriminate effects of weapons on the civilian population and mitigating unnecessary suffering. It is only in this framework that we believe we can truly bring together the users and producers of munitions

and those concerned with humanitarian values, as is the United States, and achieve results that are meaningful, that will have value, and that will result in true humanitarian progress. . . .

* * * *

On a separate issue, W. Hays Parks, Associate Deputy General Counsel, Department of Defense, and member of the U.S. delegation, on November 9, 2006, addressed a proposal for "a mandate for 'an open-ended Group of Governmental Experts to study feasible precautions which could be taken with a view to improving the design of military laser systems in order to avoid the incidence of permanent blindness to unenhanced vision.'" The proposal focused on Article 2 of CCW Protocol IV (Blinding Laser Weapons), which provides: "In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures."

Excerpts follow from Mr. Parks' remarks, providing the U.S. view that, "lacking concrete evidence of a significant humanitarian problem," no such special group was warranted, particularly given the existence of The International Commission on Non-Ionizing Radiation Protection, "an international group of experts who address ocular hazards from laser use, including military lasers." The full text of his remarks is available at *www.ccwtreaty.com/1109LaserWeapons.html*.

---

* * * *

Before proceeding, it should be noted that U.S. Department of Defense policy is more stringent than Protocol IV, that is, the United States military does not possess nor intend to develop a laser weapon specifically designed to permanently blind unenhanced vision.

* * * *

As a participant in the meetings of the Blinding Laser Weapons Working Group and all other discussions at the First CCW Review Conference in Vienna (1995) leading to CCW Protocol IV, permit me to offer a few observations:

Protocol IV was the product of extensive debate, discussion, negotiation and compromise by interested CCW States Parties.

Article 2 of Protocol IV intentionally was written in very general terms because different nations have different methods for dealing with training, weapons handling and employment. . . .

Article 2 is general because the CCW was not regarded as the proper venue for rules for employment of lawful weapons against enemy combatants. . . .

The Protocol IV drafters recognized that blinding is an historic and inevitable aspect of combat. Protocol IV does not conclude that blinding as such constitutes superfluous injury.

[Furthermore,] . . . Protocol IV does not constitute a total prohibition on blinding laser weapons. The prohibition on transfer of blinding laser weapons in article 1 makes it clear that possession is not prohibited.

. . . Laser "dazzlers"—which do not meet the definition of blinding laser weapon in Protocol IV—were deployed in Somalia in 1993. This was known and considered in our 1995 Blinding Laser Weapons Working Group discussions.

Despite various armed conflicts over the past eleven years, some of very high intensity, and despite extensive use of high-powered lasers on the battlefield, no individual has suffered permanent blindness (as defined in Protocol IV) in a single eye, let alone both, as a result of battlefield laser use. A significant humanitarian problem warranting the establishment of an open-ended Group of Government Experts or other action has not been identified.

* * * *

b. Transmittal of CCW instruments for advice and consent to ratification

On June 20, 2006, President Bush transmitted the Amendment to Article 1 of the Convention on Prohibitions or

Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects ("CCW Amendment") and the CCW Protocol on Explosive Remnants of War ("CCW Protocol V"), S. Treaty Doc. No. 109-10 (2006). The treaty document also includes the letter from Secretary of State Rice submitting the instruments to the President for transmittal dated June 12, 2006, and an attached report providing an overview of the provisions of the instruments. No action had been taken by the Senate at the end of 2006 on either of the CCW-related instruments.

(1) CCW Amendment

The June 12, 2006, letter from Secretary of State Rice submitting the CCW Amendment to the President described the amendment as follows:

> Article 1 of CCW as adopted in 1980 limited the treaty's scope of application to international armed conflict and wars of national liberation. In 1999, the United States proposed expanding the scope of CCW as a whole to non-international armed conflicts, thus according the civilian population the same protections against the indiscriminate use of landmines and certain other conventional weapons regardless of the type of conflict. States Parties adopted this amendment in 2001; it entered into force internationally on May 18, 2004.

In his transmittal letter, the President added that the amendment "does not change the legal status of rebel or insurgent groups into that of protected or privileged belligerents." *See also Digest 2001* at 836-37. Excerpts below from the report enclosed with Secretary of State Rice's letter describe key features of the amendment.

---

* * * *

The amendment to Article 1 means that the provisions in the Convention and its Protocols dealing with the use of weapons such as landmines, incendiary weapons, and blinding laser weapons will apply in all kinds of armed conflicts. Thus, states Parties would be bound by the same rules and the civilian population would be accorded the same protections in internal and international armed conflicts, without unduly restricting the legitimate security requirements of a state to combat armed rebellion within its territory. The amendment to Article 1 is consistent with U.S. military requirements and existing military practices, and advances the U.S. national objective of preserving humanitarian values during armed conflict.

* * * *

Since the expanded scope brings the requirements of the Convention and its protocols to all armed conflicts, whatever their political character, it gives no special status to "wars of national liberation" unlike Article 1(4) of Additional Protocol I to the 1949 Geneva Conventions and references thereto in Article V of the CCW itself. The U.S. declaration at the time of its ratification of the CCW in March 1995, that Article 7 of the CCW will have no effect, continues to apply. Paragraph 2 of the amendment also states that the CCW and its Protocols do not apply to situations other than armed conflict, such as internal disturbances and riots.

Paragraph 3 establishes that, if a state Party to the CCW is engaged in an internal armed conflict in its territory, the prohibitions and restrictions contained in the CCW and its Protocols will apply to both state and non-state belligerents. There is no requirement that the adverse party or parties in the conflict meet specific criteria—e.g., be organized under responsible command or exercise some territorial control.

* * * *

Finally, paragraph 7 provides that any Protocol adopted after January 1, 2002 may apply, exclude, or modify the scope of their application in relation to CCW Article 1. The first draft proposed by the United States automatically would have applied the expanded scope to all additional Protocols, but not all delegations supported

this approach. Thus, the compromise formulation requires that future negotiations on protocols will have to decide whether the provisions should apply in non-international armed conflicts. By its terms this paragraph means that the amended scope provision automatically applies to CCW protocols I, II, III, and IV.

(2) CCW Protocol V

As to CCW Protocol V, the President's letter stated:

> CCW Protocol V, which was adopted at Geneva on November 28, 2003, addresses the post-conflict threat generated by conventional munitions such as mortar shells, grenades, artillery rounds, and bombs that do not explode as intended or that are abandoned. CCW Protocol V provides for the marking, clearance, removal, and destruction of such remnants by the party in control of the territory in which the munitions are located.

CCW Protocol V entered into force internationally on November 12, 2006, six months after twenty states notified their consent to be bound by it. *See also Digest 2003* at 1066-68.

Excerpts from the report of the Secretary of State included in S. Treaty Doc. No. 109-10 follow.

---

* * * *

In December, 2001, CCW states Parties decided to address the problems caused by [explosive remnants of war ("ERW")]. In doing so, they considered the types of munitions that become ERW, technical features that could prevent such munitions from becoming ERW, measures that could facilitate their clearance and provide warning to civilian populations, adequacy of existing international humanitarian law in minimizing the post-conflict risks of ERW, and issues related to assistance and cooperation. In 2002, CCW states Parties decided to negotiate a protocol on the issue and, in November 2003, they adopted the text of Protocol V by consensus.

Protocol V is the first international agreement specifically aimed at reducing the humanitarian threat posed by unexploded and abandoned munitions of all types remaining on the battlefield after the end of armed conflicts. Protocol V contains no restrictions or prohibitions on the use of these weapons; rather, it addresses what must be done with respect to unexploded munitions that threaten civilians and post-conflict reconstruction. The Protocol deals primarily with steps to be taken before or after hostilities, not during them. Protocol V also includes a Technical Annex of suggested best practices that states Parties to the Protocol are encouraged to follow on a voluntary basis in order to achieve greater munitions reliability.

Protocol V strikes the appropriate balance between the need to address the urgent humanitarian risk posed by ERW after a conflict and to maintain the ability of states to protect their legitimate military and security interests.

* * * *

Article 3 contains the fundamental obligations of the states Parties with respect to marking, clearance, removal, or destruction of ERW. Each state Party (and non-state Parties) to an armed conflict bear responsibility with respect to ERW in territory under their control. During the negotiations, some delegations proposed that the responsibility to clear unexploded munitions should be shifted to the party that used the munitions. Such a provision would have been contrary to the long-established customary principle of the rights and responsibilities of a sovereign state over its territory; responsibility should be assigned to the entity in the best position to exercise it. The Article requires a user of explosive ordnance that becomes ERW, in situations in which a user does not exercise control of the territory, to provide, where feasible, assistance to facilitate marking, clearance, removal, or destruction of ERW.

The U.S. delegation made clear its understanding during the negotiations that the fundamental obligations of this instrument attach in the period following the cessation of active hostilities, consistent with the mandate to "negotiate an instrument on post-conflict remedial measures of a generic nature which would reduce the risks of explosive remnants of war.". . .

Decisions on taking such actions are understood to be made by the state concerned, based on its assessment of relevant circumstances at the time. The extent to which a state Party can fulfill its obligations raises sensitive diplomatic, military, domestic political, and other questions that can turn on specific circumstances. The United States (along with certain other delegations) stated their view during negotiations that feasibility standards and formulations such as "in a position to do so" that are included in the Protocol are self-judging and are intended to reflect states' need to make their own evaluation of relevant factors in implementing Protocol V's provisions. Other delegations did not dispute this position.

During the negotiations, the United States and other delegations raised the need to reconcile this Protocol with other international agreements or arrangements related to the settlement of armed conflict, in order to avoid unintended consequences in connection with peace treaties or similar arrangements. In the context of armed conflict, the parties to the conflict themselves will be in the best position to determine how the responsibilities for ERW should fit into an overall settlement. During formal closing statements made after CCW states Parties agreed to the text of Protocol V, the United States made clear its understanding that nothing in this Article or the protocol would preclude future arrangements in connection with the settlement of armed conflicts, or assistance connected thereto, to allocate responsibilities under this Article in a manner that respects the essential spirit and purpose of Protocol V.

* * * *

Article 8 addresses the provision of more general assistance and information on ERW and a state Party's cooperation with international, regional, national, and non-governmental organizations. There is no specific obligation to provide any particular type of assistance, but the provisions provide that each state Party in a position to do so shall render assistance, including marking, clearance, removal, or destruction of ERW; risk education to civilian populations; care and rehabilitation of victims of ERW; and contributions to trust funds. . . . The language "in a position to do so" was specifically designed—by delegations of states that

often act as donor states—to reserve to contributing states the determination of whether, how, and how much to assist.

This Article further provides that each state Party has the right to participate in "the fullest possible" exchange of equipment, material, and scientific and technological information (other than weapons-related technology) necessary to implement the Protocol. In addition, in paragraph 4 the states Parties undertake to facilitate such exchanges in accordance with national legislation and not to impose "undue restrictions" on the provision of clearance equipment and related technological information for humanitarian purposes. This is not an unlimited right to receive assistance: the U.S. delegation made clear during the negotiations that this provision would not affect states' discretion to restrict or deny permission to export such items for national security or other valid reasons. Other delegations did not dispute this position. . . .

* * * *

The Technical Annex contains "suggested best practice" for achieving the objectives in various articles of the Protocol and is to be implemented "on a voluntary basis." The Annex consists of three parts, each of which provides specific details on the applicable best practice.

Part 1 (Recording, storage and release of information for unexploded ordnance and abandoned explosive ordnance") corresponds to Article 4 ("Recording, retaining and transmission of information"). Part 2 ("Warnings, risk education, marking, fencing and monitoring") corresponds to Article 5 ("Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war"). Finally, Part 3 ("Generic preventive measures") corresponds to Article 9 ("Generic preventive measures").

* * * *

3. Additional Distinctive Emblem

On June 20, 2006, President Bush transmitted to the Senate for advice and consent to ratification the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to

the Adoption of an Additional Distinctive Emblem ("Geneva Protocol III"). S. Treaty Doc. No. 109-10. The President's transmittal letter explained:

> Geneva Protocol III creates a new distinctive emblem, a Red Crystal, in addition to and for the same purposes as the Red Cross and the Red Crescent emblems. The Red Crystal is a neutral emblem that can be employed by governments and national societies that face challenges using the existing emblems. In addition, Geneva Protocol III will pave the way for Magen David Adom, Israel's national society, to achieve membership in the International Red Cross and Red Crescent Movement. Legislation implementing Geneva Protocol III will be submitted to the Congress separately.

See also Digest 2005 at 1042-43. Excerpts follow from the article-by-article analysis enclosed with the letter of the Secretary of State dated June 12, 2006, submitting the protocol to the President, and included in S. Treaty Doc. No. 109-10.

---

* * * *

The Preamble emphasizes that the states Parties to Geneva Protocol III may continue to use the existing emblems they are using in conformity with their obligations under the Geneva Conventions and, where applicable, the Protocols thereto. The Preamble also acknowledges the difficulties that certain states and national societies have with using the existing distinctive emblems. Furthermore, the Preamble notes the determination of the International Committee of the Red Cross ("ICRC"), the International Federation of the Red Cross and Red Crescent Societies ("IFRC"), and the International Red Cross and Red Crescent Movement to retain their current names and emblems.

Article 1 notes that Geneva Protocol III reaffirms and supplements the provisions related to the existing distinctive emblems in the Geneva Conventions and the 1977 Additional Protocols and indicates that Geneva Protocol III will apply in the same situations.

Article 2 establishes a new distinctive emblem "in addition to and for the same purposes as" the existing distinctive emblems. Article 2 establishes that the emblems "shall enjoy equal status" and that the conditions for use of and respect for the new emblem are identical to those applicable to the existing emblems. This Article describes the new distinctive emblem as "a red frame in the shape of a square on edge on a white ground" and references the Protocol's Annex, which provides several illustrations of the emblem. Finally, Article 2 authorizes the medical services and religious personnel of armed forces of the states Parties to make temporary use of any of the distinctive emblems (including the new emblem) where such use may enhance protection.

Article 3 discusses use of the new distinctive emblem by national societies. In particular it authorizes national societies of states Parties that decide to use the new emblem to incorporate within it one or more of the existing distinctive emblems or "another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross" prior to December 8, 2005. This Article also authorizes a national society that incorporates within the new emblem one of the existing emblems to "use the designation of that emblem and display it within its national territory."

* * * *

Article 6 extends to the new distinctive emblem provisions of the Geneva Conventions and where applicable, the 1977 Additional Protocols, regarding "prevention and repression of misuse" of the existing distinctive emblems. States Parties to Geneva Protocol III are required to take measures "necessary for the prevention and repression at all times, of any misuse" of each of the emblems, including "the perfidious use and the use of any sign or designation constituting an imitation thereof." Paragraph 2 of this Article allows states Parties to permit "prior users" of the new emblem, or of "any sign constituting an imitation thereof," to continue using such emblem or signs, so long as the emblem or signs do not "appear, in time of armed conflict, to confer the protection" of the Geneva Conventions and, where applicable, the Additional Protocols.

Paragraph 2 also requires the prior user to have acquired the rights to use the emblem or signs before December 8, 2005. . . .

* * * *

The Senate provided advice and consent to the protocol on September 29, 2006, 152 CONG. REC. S10766 (2006),* and on December 18, Congress passed implementing legislation, the "Geneva Distinctive Emblem Protection Act of 2006," Pub. L. No. 109-481 (2007). The legislation provides protections to the Red Crescent distinctive emblem and the Third Protocol (Red Crystal) distinctive emblem consistent with the Geneva Conventions of August 12, 1949 and the protocols thereto. These protections correspond to the protections set forth in 18 U.S.C. § 706 for the Red Cross. The legislation also permits the Attorney General to pursue a civil injunction to prevent continued misuse of a distinctive emblem (the Red Cross, the Red Crescent or the Red Crystal) without filing criminal charges.

A press release from the White House on the day President Bush signed the bill into law stated: "Ratification and implementation of this Protocol promotes the humanitarian objectives of the United States and advances the longstanding and historic leadership of the United States in the law of armed conflict. It reflects the commitment of the United States to international law, including the Geneva Conventions." The full text of the White House statement is available at *www.whitehouse.gov/news/releases/2007/01/20070112-5.html*.

On June 22, 2006, the 29th International Conference of the Red Cross and Red Crescent adopted a decision to incorporate the additional emblem of the Red Crystal, and to admit the Israeli national society Magen David Adom and

* On September 26, 2006, when the Senate Foreign Relations Committee reported the protocol to the Senate, the Senate agreed by unanimous consent that "the protocol and [the CCW-related instruments discussed in 2.b.*supra*] that remain in committee be assigned designations of 'A,' 'B,' and 'C' respectively" to reflect that three instruments were received as part of Treaty Document 109-10. 152 CONG. REC. 10219 (2006).

the Palestinian Red Crescent Society as members of the Red Cross and Red Crescent movement. Department of State Deputy Spokesman Adam Ereli announced:

> This historic decision fulfills the aspiration of the world's oldest and largest humanitarian movement to become truly universal. Magen David Adom and the Palestinian Red Crescent Society can now count on the full support of the Red Cross and Red Crescent movement as they fulfill their mission to serve those in need.

Mr. Ereli's statement is available at *www.state.gov/r/pa/prs/ps/2006/68239.htm*.

4. Detainees

a. Overview

On October 31, 2006, John B. Bellinger, III, Legal Adviser of the Department of State, addressed the London School of Economics in a speech entitled "Legal Issues in the War on Terrorism." Mr. Bellinger prefaced his remarks by explaining:

> During the past year, I have had an intensive and ongoing dialogue with European government officials about U.S. counterterrorism laws and policies, especially those relating to the detention, questioning, and transfer of members of al Qaida and the Taliban. During this same period, the U.S. legal framework governing the detention and treatment of detainees has evolved significantly, through the passage of the Detainee Treatment Act last December, the Supreme Court's decision in the *Hamdan* case in June, the transfer of 14 al Qaida leaders to Guantanamo in September, the announcement of new DOD detention policies in September, and the enactment of the Military Commissions Act earlier this month. . . . Tonight, I want to provide a comprehensive public explanation of our legal views and policy decisions with respect

to the detention and treatment of terrorists, as these have evolved in the United States since September 11th.

Mr. Bellinger's examination of these issues is provided below. *See also* Mr. Bellinger's remarks on the fifth anniversary of the September 11th attacks delivered in Rome, Italy, September 11, 2006 and speech to the Royal Institute of International Affairs, Chatham House, London, February 9, 2006. The full texts of the speeches are available at *www.state.gov/sl/c8183.htm*.

---

* * * *

. . . I would ask you to consider four things. First, if the legal requirements applicable to the detention of international terrorists are as clear as some critics believe, I would ask you to consider why our critics are unable to agree among themselves whether we should treat detainees as combatants under the law of war or as suspected criminals under human rights law. In my discussions in Europe, I have found that our critics often assert the law as they wish it were, rather than as it actually exists today. Second, while you may not agree with our analysis on every issue, I hope you will see that we have thought hard about these issues and have a solid legal basis for our views. We have not ignored the existing rules or made up new rules. Third, where you question our approach, I would ask you to consider whether a realistic alternative approach exists and how that approach would work better in practice. Finally, I would ask you to think about whether the existing legal frameworks contained in the Geneva Conventions of 1949 and domestic criminal laws are well-suited to deal with international terrorism in the 21st century. Let me be very clear: I am not advocating that we discard our existing rules, which still serve a critical role in dealing with the situations for which we developed them. Nor am I suggesting that the United States sees a current need to negotiate a new instrument on these issues. I am suggesting, as UK Secretary of Defense John Reid did earlier this year, that we must ask serious questions about whether further developments in the law are needed.

I. War is an Appropriate Paradigm for the Conflict

The first question I want to address is whether it was appropriate and lawful in the first place for the United States to detain members of al Qaida and the Taliban, some of whom are now in Guantanamo. The majority of the detainees in Guantanamo were captured in late 2001 or early 2002 in or near Afghanistan by U.S. forces or our allies. It should be clear that U.S. and allied operations in Afghanistan during this period constituted a use of military force as part of an action in legitimate self-defense, as opposed to a massive law enforcement operation. We were in a legal state of armed conflict with al Qaida and the Taliban, which was governed by the law of war.

Why did we have a right to use military force? We were justified in using military force in self-defense against the Taliban because it had allowed al Qaida to use Afghanistan as an area from which to plot attacks and train in the use of weapons and it was unwilling to prevent al Qaida from continuing to do so. We knew from intelligence that Osama Bin Laden, his senior lieutenants, and numerous other members of al Qaida were in various al Qaida camps in Afghanistan. We gave the Taliban an opportunity to surrender those it was harboring, and when it refused, we took military action against its members.

We were also clearly justified in using military force in self-defense against al Qaida. Al Qaida is not a nation state, but it planned and executed violent attacks with an international reach, magnitude, and sophistication that could previously be achieved only by nation states. Its leaders explicitly declared war against the United States, and al Qaida members attacked our embassies, our military vessels, our financial center, our military headquarters, and our capital city, killing more than 3000 people in the process. Al Qaida also had a military command structure and world-wide affiliates. In our view, these facts fully supported our determination that we were justified in responding in self-defense, just as we would have been if a nation had committed these acts against us.

We are not alone in our view that our actions against al Qaida and the Taliban were justified under international law as an act of self-defense. The UN Security Council recognized the right of the United States to act in self-defense in response to the September 11th

attacks, as NATO did by invoking, for the first time in its history, the provisions of collective self-defense in the North Atlantic Treaty.

Moreover, if we did not have the right to use force against al Qaida and the Taliban, then we would have had no acceptable way to defend our citizens after the most devastating attack against the United States in history. Given the Taliban's unwillingness to cooperate with the international community to bring the perpetrators of the September 11th attack to justice, it cannot reasonably be argued that the only recourse the United States had was to file diplomatic protests or extradition requests with Mullah Omar.

This is my first point: Despite assertions that some Europeans do not believe the United States is in a war, it is clear that as a matter of international law, the United States and its allies were engaged in an armed conflict—not a police action—against al Qaida and the Taliban in Afghanistan as part of a lawful action in self-defense against an armed attack, and the law of war applied to these actions.

Because the United States was in an armed conflict with al Qaida and the Taliban, it was proper for the United States and its allies to detain individuals who were fighting in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities. It cannot reasonably be argued that the United States and its allies had the right to use force in Afghanistan but did not have the right to detain individuals as part of that use of force unless we planned to charge them with a crime. Our Supreme Court explicitly affirmed that the U.S. had the right to detain enemy combatants as part of our right to use force.

Some of our critics agree that we were in a war with the Taliban and al Qaida in Afghanistan in 2001 and 2002, and that our detention of at least some of the detainees was justified under the law of war. But they argue that the conflict ended in June 2002 with the establishment of Afghanistan's new government and that our legal basis for holding any detainees ended at that time. But this assertion is not consistent with the facts on the ground. The Taliban, which was the same group we were fighting against initially, continues to fight U.S. and coalition forces in Afghanistan. We see the Afghanistan conflict as a continuing conflict that began in 2001,

and believe that the United States is not obligated to release any Taliban detainees we currently hold in Afghanistan or Guantanamo, only to see them return to kill U.S. and coalition forces. Anybody who disputes that this conflict continues should consider that combat operations over the past few months have resulted in the deaths of several hundred Taliban fighters and a number of European and Canadian forces.

Equally important, however, we believe that the United States was and continues to be in an armed conflict with al Qaida, one that is conceptually and legally distinct from the conflict with the Taliban in Afghanistan. It cannot reasonably be argued that the conflict with al Qaida ended with the closure of al Qaida training camps and the assumption of power by a new government in Afghanistan. Al Qaida's operations against the United States and its allies continue not only in and around Afghanistan but also in other parts of the world. And because we remain in a continued state of armed conflict with al Qaida, we are legally justified in continuing to detain al Qaida members captured in this conflict.

I am aware that many Europeans do not agree that we are in a war with al Qaida at all, much less a "Global War on Terrorism." Let me pause here briefly to explain what we mean by the "Global War on Terrorism," because I know that this term is troubling to Europeans. We do not believe that we are in a legal state of war with every terrorist group everywhere in the world. Rather, the United States uses the term "global war on terrorism" to mean that all countries must strongly oppose, and must fight against, terrorism in all its forms, everywhere around the globe. When used in this sense, I do not think that anyone in Europe would disagree with this objective.

We do, however, believe that we are in a legal state of armed conflict with al Qaida, for the reasons I have already described. Here I also want to respond to two arguments I often hear as to why it is not correct to characterize this conflict as a war. First, some argue that a legal state of armed conflict can only occur between two nation states and that a state may not use force against an entity that is not a state. This contention is incorrect. Civil wars, which occur between a state and a non-state actor, have been among the bloodiest conflicts in recent history. The international

rules regarding the right to use force, including those reflected in Article 51 of the UN Charter, do not differentiate between an armed attack by a state and an armed attack by another entity. This makes logical sense: The principle of self-defense permits a state to take armed action to protect its citizens against external uses of force, regardless of the source. It is true that most wars of the past were between states, or existed within the territorial limits of a single state, but this is because of the technological limits of military conflict, not because of legal rules.

This principle is no less true when a non-state actor launches attacks from outside the territory of a state into that state. Over a century of state practice supports the conclusion that a state may respond with military force in self-defense to such attacks, at least where the harboring state is unwilling or unable to take action to quell the attacks. This includes the famous 1837 case of the *Caroline*, in which British forces in Canada entered the United States and set fire to a vessel that had been used by private American citizens to provide support to Canadian rebels, killing two Americans in the process. Even law of war treaties that govern the treatment of detainees in armed conflict contemplate conflicts between state and non-state actors. Indeed, any country that is party to Additional Protocol I of the Geneva Conventions, which governs certain conflicts with groups engaged in wars of national liberation, has implicitly acknowledged that a state may be in a conflict with a non-state actor.

The second argument I hear is that the United States may have been justified in using force against al Qaida, and in detaining members of al Qaida, in Afghanistan, but it is not lawful for us to use military force against or detain members of al Qaida outside Afghanistan. This argument seems more motivated by a fear of the implications about the possible scope of the conflict than by actual legal force or logic. We would all be better off if al Qaida limited itself to the territory of Afghanistan, but unfortunately, that is not the reality we face. There is no principle of international law that limits a state's ability to act in self-defense to a single territory, when the threat comes from areas outside that territory as well. Let me be very clear here: I am not suggesting that, because we remain in a state of armed conflict with al Qaida, the United States

is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London. As a practical matter, though, a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.

To those who might disagree, I would ask you to consider the alternatives. If terrorists intent on harming civilians are being harbored by a state that is unable or unwilling to act against them, what choices does the state whose civilians are in jeopardy have? If we determine the location from which Bin Laden has been planning attacks against the U.S., and the state in which he is operating is unable or unwilling to act against him, what would you have the United States do? If terrorist attacks were being planned and launched against Britain from outside British territory from a state that would not or could not act to restrain the terrorists, would Britain take no action?

One reason our critics have so vigorously refused to acknowledge that we have been and continue to be in a legal state of war is that they fear such an acknowledgement would give the United States a blank check to act as it pleases in combating al Qaida. Recognizing a state's right to take certain actions in self-defense is not to give a state carte blanche in responding to the terrorist threat. A state acting in self-defense must comply with the UN Charter and fundamental law of war principles. And whether a state legitimately may use force will depend on a variety of factors, including the nature and capabilities of the non-state actor; the patterns of activity of that non-state actor; and the level of certainty a state has about the identity of those it plans to target. It also will depend on the state from which a non-state actor is launching attacks—specifically, whether that state consents to self-defense actions in its territory, or whether the state is willing and able to suppress future attacks. Rather than suggest that the use of force against al Qaida, including the detention of al Qaida operatives, is illegitimate, it makes more sense to examine the conditions under which force and detention may be used.

18-Cummins-Chap18.indd 1110 10/22/07 11:50:16 PM

Law enforcement insufficient

I would also ask you to consider whether there is a realistic alternative to relying on the basic rules developed for armed conflict to guide a conflict with terrorists that requires a state to use military force to defeat their attacks. For instance, some critics say the right model is the law enforcement model. But would reliance on law enforcement personnel and traditional law enforcement cooperation alone really have stopped al Qaida from planning and executing its attacks around the world and in the United States, especially given the lack of a functioning government in Afghanistan? If we relied on a law enforcement model alone, we could not have used force against the Taliban and al Qaida in Afghanistan. And if we were justified in using force, as we believe we were, it would not have been workable to detain only those members of the Taliban or al Qaida immediately suspected of a crime.

More important, even if we wanted to try those we captured in Afghanistan in our civilian courts, most of the individuals now held in Guantanamo cannot be tried in U.S. courts because U.S. criminal laws did not extend to their activities in Afghanistan, with the obvious exception of those who committed specific war crimes. Nor did UK laws, which is one reason why the UK could not criminally prosecute its nationals returned from Guantanamo. In the last few years, the United States, the United Kingdom, Australia, and other countries have enacted new criminal laws with a wider extraterritorial scope. But this does not help us prosecute the detainees in Guantanamo in our civilian courts, because criminal statutes cannot have retroactive effect.

Even where the al Qaida fighters we found in Afghanistan had violated U.S. law, there are significant procedural hurdles to trying these individuals in U.S. federal court. For example, U.S. rules of criminal procedure require a clear record of the chain of custody of evidence. We could not have required our soldiers to seize, seal, and transport evidence in Afghanistan as police officers do inside our own countries, and then pulled them off the battlefield in Afghanistan to testify in court about evidence collection. This simply is not compatible with a military mission.

I am certainly aware that a number of European countries have been able to deal with terrorist groups in their countries using

their domestic criminal laws, without resorting to international humanitarian law. But these groups were different from al Qaida: in particular, their members were physically present and operated primarily inside European countries, where they could be pursued by effective law enforcement personnel and were subject to existing criminal laws. And relevant evidence and witnesses against them were available inside Europe.

This is not to say that military force and the laws of war are the *only* appropriate or legal approach to confront international terrorism generally, or al Qaida in particular. Nor is it to say that law enforcement approaches to counterterrorism should be pushed aside because they are inconvenient to implement. We recognize that other countries, like the UK, Germany, and Spain, may be able to continue to use their criminal laws to prosecute members of al Qaida. Indeed, the United States itself continues to use its criminal laws to prosecute members of al Qaida, like Zacharias Moussaoui. But we do believe that it was—and continues to be—appropriate and legally permissible to use military force and apply the laws of war, rather than pursue a criminal law enforcement approach, to deal with members of al Qaida in certain cases.

II. The Rules for this Conflict

As I have suggested, the international legal framework was not perfectly suited to handle the events of September 11. But the suggestion that the United States is using the war framework to avoid applying legal rules—to put detainees into a "legal black hole"—is incorrect on several levels. Since September 11, we have developed a law of war framework that allows us to detain, question, and prosecute individuals in a manner that is fully consistent with Common Article 3 of the Geneva Conventions, which is the standard that the U.S. Supreme Court recently held to apply as a treaty law matter to our conflict with al Qaeda.

Status of Detainees

Let me explain the reasoning behind the initial U.S. legal positions concerning the status of al Qaida and Taliban detainees. Our earliest critics suggested that we failed to comply with the Geneva Conventions because we would not treat the detainees as

Prisoners of War under the Geneva Conventions. This argument ignores the structure and terms of the Geneva Conventions.

The Third Geneva Convention does not require that everyone who takes up weapons on a battlefield receive POW status if captured. Common Article 2 of the Conventions limits their scope to armed conflicts between two or more High Contracting Parties. Thus, the bulk of the Third Convention protections, including POW status, are limited to belligerents engaged in international armed conflict between States. The U.S. Supreme Court's *Hamdan* decision reflects that the conflict between the United States and al Qaida is not an international armed conflict. Thus, as a matter of treaty structure, this means that captured al Qaida fighters are not entitled to POW protections.

With regard to the Taliban, which was at the time the effective government of a party to the Geneva Conventions, the text of Article 4 of the Third Geneva Convention makes clear that their fighters are also not properly considered POWs. The Taliban does not meet that Article's requirements, because its fighters did not carry arms openly, wear a uniform recognizable at a distance, and respect the laws and customs of war. Instead, they are "unlawful combatants," a term which was not invented by the Bush Administration but rather has long been recognized by international law and used in European treatises.

And ironically, even if we had decided to treat the Taliban and al Qaida as POWs, as a matter of either law or policy, the Geneva Conventions do not require us to try them or release them.

While the United States is not required to treat these detainees as Prisoners of War, or to prosecute or release them, this does not mean that no applicable legal rules govern their detention. Over the course of the last five years, our Executive branch, our Congress, and our courts have developed a comprehensive framework of legislative rules and administrative procedures to govern the detention, treatment, interrogation, and trial of suspected members of al Qaida and the Taliban who are not covered by other laws.

First, our Executive branch has established procedures to make sure that we are detaining the right people. We recognize that critics have repeatedly asked, "How did you know that the individuals you detained were members of the Taliban and al Qaida?

Many detainees claim they were simply in the wrong place in the wrong time." Admittedly, identifying members of the Taliban and al Qaida was difficult, because unlike a traditional war, the Taliban and al Qaida did not wear uniforms and insignia. Nevertheless, our forces worked hard to detain only those individuals who were actually engaged in combat or who we reasonably suspected of having been engaged in combat or of being a member of al Qaida. And when our forces pick up someone who proves after initial screening not to be a combatant, we release that person. The same is true in any war.

To ensure that we are holding the right people, every detainee in Guantanamo has his case reviewed by a formal Combatant Status Review Tribunal, which determines whether a detainee is properly classified as an enemy combatant. The detainee has the assistance of a military officer, may present evidence, and may appeal the determination of the CSRT to our federal courts. It is simply not correct to say that detainees have not and will not have access to our federal courts to review their detention. Some detainees have been released as a result of this process.

Detainees who the United States does not intend to prosecute by military commission also have their detention reviewed annually by an Administrative Review Board. This Board determines whether the detainee can be released or transferred without posing a serious threat to the United States or its allies. We are aware of concerns about the indefinite nature of the conflict with al Qaida and the resulting concerns about indefinite detention. ARBs attempt to address these concerns by balancing our authority to detain fighters so they do not come back to fight us again against our desire not to hold anyone any longer than necessary. To date, approximately 75 detainees have been released or transferred pursuant to the ARB process. I would ask you: does the fact that the conflict with al Qaida may go on indefinitely mean that we should simply release all members of al Qaida?

Second, our laws and policies related to detainees dictate clear rules about the standards of treatment that all detainees in our custody must receive. Last December, Congress passed the Detainee Treatment Act, enacting in law a prohibition on cruel, inhuman, and degrading treatment that applies to all U.S. officials

wherever located. In June, the Supreme Court held in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaida. In September, DOD announced a comprehensive new DOD detention and interrogation policy that is fully consistent with, and in many ways exceeds, the minimum standards contained in Common Article 3. For example, all detainees in DOD custody receive POW protections unless and until a competent tribunal determines otherwise. Most recently, Congress enacted and the President signed into law the Military Commissions Act, which codified serious violations of Common Article 3, including torture, mutilation, hostage-taking, and other offenses.

Third, our Congress has provided a statutory framework for members of the Taliban and al Qaida to be tried for war crimes by military commission. The Military Commissions Act provides the legislative basis that our Supreme Court determined was lacking in the President's original Military Order. In addition, this Act makes numerous changes to the original military commissions to address the substantive concerns raised by the Supreme Court and by the international community, and to ensure that military commissions are consistent with Common Article 3's requirement that individuals be tried by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

For example, the accused now will have an unqualified right to hear all the evidence against him and may appeal his conviction to our independent Article III courts all the way to the Supreme Court. The accused is presumed innocent; has the right to represent himself; has the right to military counsel; is entitled to cross-examine prosecution witnesses; and need not testify against himself. No evidence derived from torture may be admitted, and if the accused alleges that a statement resulted from coercion, the statement may not be admitted unless the judge determines that the statement was reliable and that it would be in the interest of justice to do so. The military commission procedures provide all of the fundamental guarantees of fairness and due process and are very similar to the procedures in our civil courts and our courts martial. Although I am aware that some critics continue to assert that the military commission procedures are unfair, there is no basis for these assertions, and at this

point I believe these critics should focus not on the theoretical but on how the commissions actually work in practice.

We believe that we have developed a legal framework that is appropriate for our conflict with al Qaida. We recognize and respect that the United Kingdom, as a party to the European Convention on Human Rights and to the Additional Protocols to the Geneva Conventions, has differing legal requirements than the United States, which is not a party to those instruments. Because we are on new terrain, we hope that others will recognize and respect that U.S. policies and practices have had to evolve significantly since September 11. These changes demonstrate the complexity of the issues we have been forced to confront, and the self-correcting mechanisms inherent in the U.S. system of checks and balances.

III. Future of Guantanamo

In addition to working to clarify the legal rules applicable to detention, we are also working to address specific international concerns about the detention facilities at Guantanamo Bay. In his September 6 remarks, President Bush again reiterated that he would like to close Guantanamo as soon as practically possible.

But he also explained the difficulties we face in trying to persuade those countries with nationals at Guantanamo to take them back. In some cases, a state of nationality will not acknowledge that these individuals are its nationals. Other times, a state of nationality simply does not want the individual returned to it, or is willing to reclaim its nationals but cannot provide the security and humane treatment guarantees that we require before we will transfer them. Critics cannot demand that the detainees in Guantanamo must be released, but also say that they cannot be returned to the countries where they came from, without offering a realistic alternative destination for the detainees.

Simply calling for closure of Guantanamo will not help us to close Guantanamo any faster. European officials who want the U.S. to close Guantanamo should offer realistic suggestions as to how to do so, including by offering to help. One concrete step that European states could take to help us reduce the population at Guantanamo is to consider resettling those detainees who cannot be returned to their home countries. To date only Albania has

taken such a step, agreeing to take five Uighur detainees who were no longer considered enemy combatants. Another step would be to help persuade countries with nationals at Guantanamo to accept responsibility for their nationals, including by urging them to provide us with adequate security and treatment assurances.

* * * *

In remarks delivered at the Duke Law School Center for International and Comparative Law on November 15, 2006, entitled "Reflections on Transatlantic Approaches to International Law," Mr. Bellinger spoke to the suggestion that the United States should have granted the Guantanamo detainees POW status as a matter of policy even if they did not meet the requirements of the Third Geneva Convention:

> . . . In fact, U.S. policymakers seriously considered doing this in 2002, but ultimately rejected this approach because they concluded that it would not serve the purposes of the Geneva Conventions to give POW status to a group responsible for the slaughter of thousands in disregard of the law of war.
>
> The Third Convention creates a compact for those engaged in international armed conflict. Engage lawfully in combat and, if captured, you will receive comprehensive treatment protections. Ignore the laws of war, and you will not be entitled to those protections. POW status can thus be seen as an incentive to follow the rules. Weaken that incentive and the losers would be not only our own soldiers, but civilians—who bear the brunt of suffering when unlawful combatants operate surreptitiously within the general population.

b. U.S. submissions to the United Nations relating to detainees

(1) Response to Report of Rapporteurs on Guantanamo

On February 27, 2006, five mandate holders (referred to as special rapporteurs) of the UN Commission on Human

Rights released a report entitled, "Situation of Detainees at Guantanamo Bay," U.N. Doc. No. E/CN.4/2006/120, available at *http://documents.un.org*. In a reply to the report, dated March 10, 2006, the United States "profoundly object[ed] to the Report both in terms of process and of substance and underscore[d] that the Report's factual and legal assertions are inaccurate and flawed." Section III of the U.S. reply, "Summary of Flaws in Special Rapporteurs' Report," is set forth below. The full text of the reply is available at *www.state.gov/s/l/c8183.htm*. *See also* letter of January 31, 2006, providing a brief initial response of the United States to a draft of the report, attached to the February 27 report as Annex II, E/CN.4/2006/120 at 53.

III. SUMMARY OF FLAWS IN SPECIAL RAPPORTEURS' REPORT

Process Issues

• The Special Rapporteurs issued their Report without visiting Guantanamo, despite our invitation to three Rapporteurs to visit the facility.

o The proposed visit would have afforded unprecedented access for UN experts to a military detention facility and would have been similar to that which we provide to U.S congressional delegations.

o Indeed the report selectively notes that the United States did not offer them unrestricted access to prisoners, but it does not mention that the United States invitation expressly offered them a visit that included:

• meeting with the Commander of Joint Task Force Guantanamo and receiving a briefing on operations by senior command, medical and operational staff;
• visiting the camps and cells housing the detainees;
• visiting the medical facilities; and
• observing operations at the facilities including recreational, religious, cultural and nutritional practices.

- o Had the invitation been accepted, the Special Rapporteurs would have observed first-hand the conditions of detention. This would have enabled them to assess:
  - the actual conditions of the detainees;
  - the superb medical treatment they receive, including the humane procedures in place with respect to those detainees; and
  - the measures taken by the United States to provide the detainees with Korans, to respectfully treat that holy book, and to structure operations of the facility to facilitate the practice of their religion.
- o It is instructive to compare their Report to the writings of individuals who have visited the facilities and reported that they found it very different from their preconceptions.

• Not only have the Special Rapporteurs not come to Guantanamo, but they have not come to Washington to be formally briefed by appropriate DoD officials on GTMO operations, an invitation offered earlier last year.

- o DoD and State Department officials have met with the Special Rapporteurs in Geneva, but not for detailed discussions.

• The Special Rapporteurs also appeared to disregard the substantial informational material made available to them and to the public on Guantanamo detention and treatment,* including the US government's:

- o lengthy written response to their 45 questions;
- o May 2005 report on its implementation of the Convention Against Torture, which included a lengthy annex on U.S. operations at Guantanamo;
- o October 2005 report on its implementation of the International Covenant on Civil and Political Rights; and

* Editor's note: The documents referred to under this heading are excerpted in *Digest 2005* as follows: U.S. response to 45 questions from the rapporteurs, at 987-94; Periodic Report to the Committee Against Torture, at 961-87; and Report on the International Covenant on Civil and Political Rights, at 258-300.

- o the vast information—including declassified documents—about Guantanamo available on the Department of Defense website;
- o as well as documents submitted to United States courts.

• Their draft Report accordingly contains serious errors of omission, for example regarding:

- o instructions and guidelines for involuntary feeding;
- o the excellent medical care provided to detainees;
- o the complete results of DoD investigation of reported misuse of the Koran, which found that reported instances of misuse were very few compared to total number of contacts with the Koran; and
- o corrective measures, such as the DoD prohibition on the use of dogs during interrogations.

• The draft Report also presumes factual allegations to be true without verifying them.

- o An example is the statement in paragraph 54:

  "According to reports by defence counsels, some of the methods used to force-feed definitely amounted to torture. In the absence of any possibility of assessing these allegations in situ by means of private interviews with detainees subjected to forced feeding, as well as with doctors, nurses and prison guards, the allegations, which are well substantiated, must be assessed to be accurate."

Defense counsel's reports were refuted in court by Guantanamo medical personnel. This fact is completely ignored in the Report.

- o It is unfortunate that the special rapporteurs would make such a polemical allegation, based only on the statements of the detainees themselves and of their lawyers (whose basis for opinion would also be the statements of the detainees), and that they made no independent attempt to contact the doctors at Guantanamo to learn what actual medical procedures are used there.

• We profoundly disagree with the Report for its selective inclusion of only those factual assertions needed to support the Report's initial conclusions while avoiding facts that would undermine those conclusions.

Substance - Legal Errors

- The Report contains numerous glaring legal errors, of which we point out only the most egregious.
- At its core the Report asserts that the basis for the United States position that it is engaged in armed conflict is a rhetorical reliance on a generalized war on terrorism, that is, the Report states (or "strongly suggests") that we are not at war.
  - o This is wrong and demonstrates a remarkable forgetfulness of the armed attacks on the United States and the responsibility of the United States to defend itself.
  - o Al Qaida and its Taliban affiliates have waged war against the United States, a fact recognized by the United Nations Security Council, NATO, Australia under the ANZUS Treaty, and the members of [the] OAS under the Rio Treaty. The conflict is ongoing, and our Reply will identify numerous terrorist acts committed by Al Qaida and its affiliates spanning more than a decade resulting in death and injury to thousands of individuals world-wide.
  - o To suggest that the United States may not defend itself in these circumstances is to allow an armed group to wage war against the United States while stripping us of the inherent right of self-defense.
- The law of armed conflict governs the conduct of armed conflict and related detention operations, and permits lawful and unlawful enemy combatants to be detained until the end of active hostilities without charges, trial, or access to counsel.
  - o Combatants may be detained to prevent them from taking up arms against the United States.
  - o This is the principal reason for Guantanamo detention, an important point which the Report questions and disregards.
  - o It is also the reason why the United States has given the International Committee of the Red Cross, rather than human rights rapporteurs, unimpeded access to the detainees at Guantanamo.
- The Report's improper conflation of the law of war (also known as international humanitarian law) and international human rights law is a fundamental flaw that undercuts virtually all of the Report's conclusions.

- The Report states that the ICCPR provides the rules governing Guantanamo detention and proceeds to charge the United States with a violation of several of its provisions.
  - o This is wrong: apart from the fact that operations at Guantanamo are governed under the law of war, by its express terms and clear negotiating record, the ICCPR applies to each State Party only with respect to "individuals within its territory and subject its jurisdiction." The ICCPR thus does not cover operations at Guantanamo, which is not United States territory.
  - o To apply the ICCPR to unlawful combatants leads to the manifestly absurd result that they receive more rights and privileges than lawful combatants, including the right to be prosecuted and brought to trial or released.
- The Report misinterpreted human rights law authorities.
  - o It conflates *jus cogens* (peremptory) norms with the ICCPR's listing of non-derogable provisions applicable to States Parties to the Covenant (see ICCPR article 4)
    - This is wrong: While there is some overlap between these two categories of rights, for example regarding torture and slavery, the Report's equation is legally incorrect and is not supported by binding legal authority.
  - o The . . . Report relies on General Comments of the Human Rights Committee to set the norm for United States conduct.
    - This is wrong: The ICCPR does not govern Guantanamo operations and its treaty body's General Comments are the non-binding view of independent experts.
  - o It holds that all incommunicado detention is prohibited under the CAT.
    - This is wrong: There is no binding legal authority for this proposition.
    - The Report persistently seeks to impose obligations on the United States that were explicitly rejected or otherwise could not be achieved in treaty negotiations.

- o It presumes binding legal obligations on the United States to use involuntary feeding only at a certain stage of a hunger strike and to allow persons in our custody to die.
  - This is wrong: The assertions of international law obligations are fabricated from whole cloth. There is not support for these propositions under international law, and we believe them to be contrary to our responsibility to protect the life and the health of persons under our custody at Guantanamo.

Factual Errors—a small sampling

- Feeding techniques amount to torture (para 54)
  - o Techniques used are the same regimen used in custodial settings in the United States and are the preferred medical option.
  - o Again, it is worth noting that this easily could have been verified if the Rapporteurs had accepted the invitation to visit with the doctors at Guantanamo or otherwise requested a meeting with such doctors at another venue.

* * * *

- "There have been consistent reports about the practice of rendition and forcible return of Guantanamo detainees to countries where they are at serious risk of torture"—a "United States practice of 'extraordinary rendition.'" (paragraph 55)
  - o This is also false. It is explicit United States policy not to transfer individuals to other countries where the United States believes it is "more likely than not" that they will be tortured. In appropriate cases the United States obtains assurances from any receiving country that it will not torture the individual being transferred to that country.

* * * *

- Interrogation "techniques meet four of the five elements in the Convention definition of torture."
  - o This statement is wholly misleading. The four elements described in the report are:
    - acts conducted by government officials;
    - acts had a clear purpose (for example, to gather intelligence);

- acts were committed intentionally; and
- victims were in a position of powerlessness.

o These four factors would apply to thousands of wholly benign acts regarding the treatment of any detainee anywhere in the world, including the use of incentives ranging from extra recreational time or access to extra sweets or reading materials. Saying that four of five elements of torture are satisfied creates the misleading impression that U.S. conduct is somehow abusive or nefarious.

• The Report baldly misquotes original sources, for example regarding the Secretary of Defense's April 16, 2003 memorandum on interrogation techniques (para 50 of Report)

o The Report quotes the Secretary's memo as follows: "S. Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli"

o The memo actually reads: "S. Change of Scenery Down: Removing the detainees from the standard interrogation setting and placing him [in] a setting that may be less comfortable; **would not constitute a substantial change in environmental quality**." (Emphasis added.)

A fuller discussion of the numerous factual errors in the Report is contained in Section X of this Reply, and an extensive factual description of Guantanamo operations is contained in the USG Reply to the 45 Questions posed by the Special Rapporteurs dated October 21, 2005, attached as an Annex to this Reply.

(2) U.S. Report to Committee Against Torture

As discussed in Chapter 6.F.2., the Committee Against Torture considered the most recent U.S. periodic report to it, and reports by several other countries, during May 2006. The United States submitted written responses to the Committee's list of issues on May 5, 2006, as excerpted below and available at *www.usmission.ch/Press2006/CAT-May5.pdf.* In each instance, the Committee issue is set forth in bold with the U.S. response following in regular font.

---

* * * *

7. According to information before the Committee (Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2005/65), para. 364), **the State party has established secret detention facilities, including onboard vessels, and holds unacknowledged detainees with no access to the International Committee of the Red Cross (ICRC), no notification of families, no oversight with regard to their treatment, and in most cases no acknowledgement that they are even being held. Please provide a list of all detention facilities where detainees are being held under the de facto effective control of the State party's authorities . . . , outside its territory or on State party vessels, as well as information on the number, nationality, charges against and exact legal status of these persons. Why have such secret detention facilities been established? Does the State party assume responsibility for alleged acts of torture perpetrated by its own public agents outside its territory but in territories under its jurisdiction or de facto control . . . , as well as in cases where those acts are perpetrated by persons who are not public agents but are subject to the control of the State party?**

As a preliminary matter, we would note that the customary law of armed conflict does not require States to provide the ICRC with access to unlawful combatants who are in their custody. Even where the Geneva Conventions apply, those conventions specifically acknowledge that, where a Party to the conflict is satisfied that an individual protected person on its territory is definitely suspected of or engaged in activities hostile to the security of the State, such persons are not entitled to the rights and privileges afforded by the Convention as would be prejudicial to the security of the State. Similarly, in occupied territory, where an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication with the outside world because they pose a security threat. Of course, in all cases, such persons must be treated with humanity.

Moreover, it is the policy of the United States not to comment on allegations of intelligence activities.

However, the U.S. government is clear in the standard to which all entities must adhere. As noted in paragraph 7 of the *Second Periodic Report*, all components of the U.S. government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment, as defined in U.S. law. The U.S. government does not permit, tolerate, or condone unlawful practices by its personnel or employees under any circumstances. As already noted, 18 U.S.C. §§ 2340 & 2340A make it a crime for a person acting under the color of law to commit, attempt to commit, or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, the prohibition on cruel, inhuman, and degrading treatment or punishment applies as a matter of law to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location."

8. In view of the numerous allegations of torture and ill treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison, what specific measures have been taken to identify and remedy problems in the command and operation of those detention facilities under the jurisdiction of the State party? What measures have been undertaken to ensure that the ICRC has appropriate access to all such facilities and to all detainees, and that its reports are made known to sufficiently senior members of the chain of command for purposes of implementation?

While the United States is aware of allegations of torture and ill-treatment and takes them very seriously, it disagrees with the suggestion that such practices are widespread or systematic. These allegations must be placed in context: they relate to an extremely small percentage of the overall number of persons in detention. Moreover, it is obvious that not all allegations reflect actual abuse. For example, it is well known that the Al Qaeda Manchester

training manual instructs all Al Qaeda members to allege torture when captured, even if they are not subjected to abuse. Of course, where allegations are well-founded, the United States deplores the abuse and takes action.

Examples of specific measures taken in response to alleged abuses are provided in the *Second Periodic Report*. Section III(B) of Part One of the Annex provides extensive information about specific measures taken in response to alleged abuses at DoD detention facilities in Afghanistan and Guantanamo Bay, Cuba. Section III(B) and V of Part Two provide details about specific measures taken in response to the shocking events of Abu Ghraib in Iraq.

With respect to access and information provided by the International Commiteee of the Red Cross (ICRC), the ICRC has access to every detainee at DoD facilities worldwide, including at Guantanamo and in Iraq and Afghanistan, and may meet privately with detainees under DoD control. DoD accounts for detainees under its control fully and provides notice of detention to the ICRC as soon as practicable. The policy of the Department of Defense is to assign an internment serial number (ISN) and register detainees with the ICRC as soon as practicable, normally within 14 days from capture.

The ICRC transmits its confidential communications to senior officials in the Department of Defense, including military commanders in Afghanistan, Iraq, and Guantanamo, and to other senior officials of the United States Government. The Department of Defense has established procedures to ensure that ICRC communications are properly routed to senior leadership and acted upon in a timely manner. The Department of Defense works with the ICRC to identify and correct matters of concern that come to light. Although our dialogue with the ICRC is confidential, we take seriously the matters the ICRC raises and have made changes and improvements based on its recommendations. Representatives of the ICRC meet routinely with DoD and other U.S. government officials to discuss detention issues. We value the relationship between the U.S. government and the ICRC, and DoD officials will continue to discuss detention issues with the ICRC.

* * * *

10. Please comment on information transmitted to the Committee that criminal responsibility of perpetrators of torture may be waived under the President's authority as Commander-in-Chief. Does the State party attribute to any person the right to authorize torture or ill-treat anyone under any circumstances? If so, to whom? . . .

As noted in Section III(B)(1) of the Annex to the *Second Periodic Report*, concerns such as those cited by the Committee were generated by the August 2002 Memorandum prepared by the Office of Legal Counsel at the U.S. Department of Justice, on the definition of torture and the possible defenses to torture under U.S. law. As described also in response to Questions 1 and 2 above, the 2002 Memorandum was withdrawn on June 22, 2004 and replaced with the December 2004 Memorandum.

The December 2004 Memorandum stated that it "supersede[d] the August 2002 Memorandum in its entirety" and clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[9] Under Article 2 of the CAT, "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture." Moreover, under Article 2, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

The United States stands by these obligations under the CAT. As noted in paragraph 6 of the *Second Periodic Report*, the United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a

[9] Memorandum for James. B Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 23402340A* (Dec. 30, 2004) at 2.

superior officer or public authority may be invoked as a justification or defense to committing torture under the CAT. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. government.

With regard to investigations conducted by the Department of Defense, the Department has conducted numerous investigations into all aspects of its detention operations following the events of Abu Ghraib. It has conducted over 12 major reviews and continues to examine this issue. Further, the United States refers the Committee to Section III(B)(1) of the Annex to the *Second Periodic Report* which describes in detail the reviews and investigations that have already occurred. Of particular relevance to the Committee's question is the citation to the testimony of Vice Admiral Church to the U.S. Senate Armed Services Committee that after his lengthy investigation—the broadest review of interrogation policies to date—he had concluded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." (fn. omitted)

In addition, U.S. policy regarding the care and treatment of detainees under its control is clear. Alberto Gonzales, then Counsel to the President, stated: "The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. . . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable." (fn. omitted)

* * * *

12. Have the several versions of interrogation rules, instructions and methods, specially regarding persons suspected of terrorism, that have been adopted been consolidated for civilian and military use, especially for the CIA and the military intelligence services?

Are persons detained outside the State party, but under its jurisdiction, protected by the same norms regarding interrogation rules, instructions and methods?

The Detainee Treatment Act of 2005, enacted December 30, 2005, prohibits cruel, inhuman, and degrading treatment or punishment and applies as a matter of law to protect any persons "in the custody or under the physical control of the United States Government regardless of nationality or physical location." The Act further provides that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." (fn. omitted)

As required under the law, only those interrogation techniques authorized by and listed in the United States Army Field Manual on Intelligence Interrogation are authorized for the interrogation of detainees under the control of the Department of Defense personnel, without regard to whether interrogations are conducted by military or civilian interrogators. The Department of Defense issued on December 30, 2005, specific instructions notifying every Command of this requirement, as well as all DoD Components and field activities.

The question also asks about any interrogation rules, instructions, and methods that may have been adopted by the CIA. As already noted, the United States does not comment publicly on alleged intelligence activities. But, as also already noted, any activities of the CIA would be subject to the extraterritorial criminal torture statute [18 U.S.C. § 2340A] and the Detainee Treatment Act's prohibition on cruel, inhuman, or degrading treatment or punishment.

* * * *

23. Are the terms of the Convention applicable to the armed forces and other personnel, including contractors, when participating

in peacekeeping or other military operations either alone or as part of an internationally authorized contingent? . . .

Article 10 relates to the education and training of all persons "who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" about the prohibition against torture. . . .

24. What educational programmes and information, rules and instructions, and mechanisms of systematic review exist for military personnel involved in the custody, interrogation or treatment of individuals in detention?

There are extensive programs of training and information, rules and instructions, and mechanisms of systematic review that apply to military personnel involved in the custody, interrogation or treatment of detainees. . . . Of course, the United States recognizes that no training program, however extensive, will be able to prevent every case of abuse.

Education programs and information for military personnel, including contractors, involved in the custody, interrogation or treatment of individuals in detention include training on the law of war, which is provided on at least an annual basis (and more frequently as appropriate) for the members of every service and for every person, including contractors, who works with detainees. This extensive training on law of war includes instruction on the prohibition against torture and the requirement of humane treatment and other subjects, including human rights. This training is described in detail in Annex 3.

* * * *

Mechanisms for systematic review include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits as well as reviews conducted pursuant to unit procedures and by the chain of command. They also include case-specific investigations and overall reviews, including the 12 major Department of Defense reviews of detainee policy described in detail in the Annex to the *Second Periodic Report*.

* * * *

Article 11

26. Could the use of the word "extreme" in the December 2004 memorandum (*Memorandum for James B. Comey*, op. cit.) **create unnecessary confusion for trainers and personnel, considering that, according to the report by Major General Fay, Lieutenant General Jones, and General Kerna, "military personnel or civilians appeared to have abused Iraqi prisoners due to . . . confusing interrogation rules"** (Page 75 of the report (annex 1).).

As explained in the Annex to the *Second Periodic Report*, the main finding of the investigation conducted by General Kern, Lieutenant General Jones, and Major General Fay (commonly referred to as the Jones-Fay report) was that a small group of individuals, acting in contravention of U.S. law and DoD policy, were responsible for perpetrating the acts of abuse at Abu Ghraib. Specifically, in an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." This finding has been supported in 12 other major reviews conducted by the Department of Defense.

27. Please provide detailed examples of revisions of interrogation rules, instructions, methods and practices after the August 2002 memorandum was superseded by the December 2004 memorandum (Para. 62 of the report.). **Are there any specific interrogation rules, instructions and methods for specific agencies, or do the same apply to all personnel, including the limits on interrogation techniques? . . .**

On an ongoing basis, the United States reviews and, where appropriate, makes revisions to its interrogation rules, instructions, and methods. For example, with regard to the Department of Defense, pursuant to the Detainee Treatment Act of 2005, the Deputy Secretary of Defense issued Department-wide guidance on December 30, 2005. The Deputy Secretary noted that the President's February 7, 2002 direction that all persons detained by the U.S. Armed Forces in the War on Terrorism shall be treated humanely

remains in effect. The Deputy Secretary further directed that consistent with the President's guidance, DoD shall continue to ensure that no person in the custody or under the physical control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. Finally, the Deputy Secretary directed that "effective immediately, and until further notice, no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or interrogation approach that is not authorized by and listed in United States Army Field Manual 3452, Intelligence Interrogation, September 28, 1992."

Other U.S. government agencies may also have their own interrogation policies. As already noted, any activities of such other agencies would be subject to the extraterritorial criminal torture statute and the prohibition on cruel, inhuman, or degrading treatment or punishment in the Detainee Treatment Act of 2005.

* * * *

40. Is the State party considering reviewing its decision not to apply the Geneva Conventions of 12 August 1949 to detainees who are considered "enemy combatants" by the State party, in Afghanistan, Iraq, Guantánamo Bay or in other locations under the jurisdiction of the State party? What is the exact legal status of those persons, and what international instruments are applicable to them for the protection of their human rights?

The applicability of and compliance with the Geneva Conventions is a matter unrelated to the scope of U.S. obligations under the CAT. In addition, as is made clear by the detailed discussion in Part One, Section II(B) of the Annex to the *Second Periodic Report*, the Committee's question has false premises. The United States has not made any "decision not to apply" the Geneva Convention where it would by its terms apply. For example, the President made clear at the start of Operation Iraqi Freedom that the United States would apply the Geneva Conventions to the conflict.

The President determined that the Third Geneva Convention Relative to Prisoners of War *does* apply to the Taliban detainees, but that the Taliban fail to meet the requirements of Article 4 of that Convention and so are not entitled to the status of prisoners of war. With regard to the al Qaeda detainees, the President did determine that the Geneva Convention did not apply because al Qaeda is not a party to the Convention. Article 2 of the Convention makes it clear that the Convention only applies as between High Contracting Parties.

Nevertheless, President Bush determined in 2002 that "the United States Armed Forces shall continue to treat detainees humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

Moreover, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States Government does not authorize or condone torture of detainees. Torture and conspiracy to commit torture are crimes under U.S. law, wherever they may occur in the world. Moreover, no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. Violations of these and other detention standards have been investigated and punished.

On a final note, the United States is aware that questions are often raised about the concept of "unlawful combatants," which certain academics and others have asserted is not a concept found in the Geneva Conventions. The United States strongly disagrees: the concept of "unlawful combatants" is well-recognized in international law by courts, in military manuals, and by international legal scholars. For example, Professor Adam Roberts, who has written widely on the law of armed conflict, has stated that the concept of unlawful combatants is implicit in the Geneva Conventions. Another leading scholar, Ingrid Detter, has noted that unlawful combatants, while legitimate targets for belligerent action, are not entitled to prisoner of war status if they are captured.

Article 15

41. Please provide examples of any judicial cases where the courts have declared statements inadmissible on the ground of having being obtained coercively.

As the United States explained in its *Initial Report*, and in its *Second Periodic Report*, U.S. law provides strict rules regarding the inadmissibility of coerced statements. U.S. courts take these rules seriously. *See*, *e.g.*, *United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006) (suppressing confession despite the fact that officers delivered Miranda warnings in advance of questioning); *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) (holding that, under the circumstances of the case, a renewed confession after intervening Miranda warnings was not voluntary and thus inadmissible). The *Initial Report* included a several page discussion, citing well over a dozen cases, describing how U.S. rules regarding the exclusion of coerced statements are even stricter than the CAT requires. We direct the Committee to those reports for further details.

42. How is the provision in article 15 of the Convention prohibiting the use of any statement obtained as a result of torture as evidence in any proceedings, except against the alleged torturer, specifically guaranteed at the Combatant Status Review Tribunals and at the Administrative Review Boards. . . .

Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards. With regard to military commissions proceedings, the United States would like to draw the Committee's attention to Military Commission Instruction Number 10, dated March 24, 2006, which provides that "the commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except as evidence against a person accused of torture as evidence the statement was made."

On May 12, 2006, the United States submitted responses to additional questions posed by the Committee Against

Torture during the final session on May 8, 2006, available at *www.usmission.ch/Press2006/051206CAT.pdf.* The response to a question on the Detainee Treatment Act is set forth below.

---

* * * *

5. Does the Detainee Treatment Act prevent prisoners at Guantanamo Bay from suing civilly for redress if tortured, and, if so, does it prevent them from suing even after release?

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741 (December 30, 2005) ("DTA") bars all civil claims brought by aliens detained by the Department of Defense at the Guantanamo Naval Base, except as provided under that Act. . . .

Beyond the review afforded under the DTA, the DTA bars all other civil claims "against the United States or its agents relating to any aspect of the detention," if the claims are brought by or on behalf of an alien detained by the military at Guantanamo. If a detainee was determined to be an enemy combatant by the Combatant Status Review Tribunal and if that determination is upheld by the D.C. Circuit, then the DTA's bar against civil filings regarding "any aspect" of the detention continues after release from military custody. With respect to detainees released from military custody prior to the enactment of the DTA and those released subsequently, but absent a ruling by the D.C. Circuit confirming the validity of the detainee's enemy combatant status, the DTA appears not to bar civil actions regarding the prior detention. There, of course, would be other legal impediments and defenses that may bar any recovery if such a claim is filed.

* * * *

The Committee Against Torture released its conclusions and recommendations with respect to the United States on May 19, 2006. In a press briefing of the same date, Mr. Bellinger provided preliminary comments as excerpted below. The full text of the press briefing is available at

www.usmission.ch/Press2006/0519BellingeronCAT.htm. The final report, U.N. Doc. No. CAT/C/USA/CO/2 (July 25, 2006), is available at *documents.un.org.*

---

* * * *

. . . [W]e are disappointed that despite the fact that the committee acknowledges the extensive materials that we gave to them . . . [i]n many ways, it appears that the report was written without the benefit of th[at] information . . . [A]s a result there are numerous errors of fact, just simply things that they got wrong about what the U.S. law or practice is. We also think that there are a number of misstatements of the law as well in the report.

The committee also seems to have stretched in a number of areas to address issues that are well outside its mandate and outside the scope of the Convention Against Torture. . . .

. . . [W]e'll continue to study the report. They've asked us to get back in a year to them with answers on some questions and I'm sure that we will be getting back to them in a year. We do take our obligations seriously under the Convention Against Torture. We think that we are in compliance with our obligations.

And . . . let me add one more thing that we said when we were in Geneva, which is that much has changed in the last few years. We acknowledge that there were very serious incidents of abuse. We've all seen Abu Ghraib. There have been numerous other allegations. There have been other incidents. We have investigated those. We've held people accountable. But as I said at the time . . . clearly our record has improved over the last few years. We are endeavoring hard to address all of these issues of abuse. The Defense Department, our intelligence agencies have adopted new procedures, new training. We have the McCain amendment, so we have new laws, new procedures, more training in place and people are being held accountable for the abuses that did happen in the past.

* * * *

c. Military commissions and detainee treatment

(1) Supreme Court decision in Hamdan v. Rumsfeld

On June 29, 2006, the U.S. Supreme Court ruled that "the military commission convened to try [Salim] Hamdan lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice ('UCMJ')] and the Geneva Conventions." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The Court reversed a court of appeals decision denying a petition for a writ of habeas corpus by Hamdan, a Yemeni national taken into U.S. military custody in Afghanistan, held in Guantanamo Bay, Cuba, and charged with one count of conspiracy "to commit . . . offenses triable by military commission," and remanded for further proceedings. For discussion of the lower court decisions in the case, *see Digest 2005* at 994 and *Digest 2004* at 1018-29.

Among other things, the Court also held that the Detainee Treatment Act's provision stripping courts of jurisdiction over habeas applications and other actions relating to the detention of aliens at Guantanamo did not apply to pending cases and therefore did not divest the Court of jurisdiction in this habeas case. The Detainee Treatment Act is discussed in *Digest 2005* at 1030-39.

The Court did not decide several additional arguments raised by Hamdan including: (1) that the DTA should be construed narrowly because there is a significant constitutional question whether Congress can impinge upon the Supreme Court's appellate jurisdiction, particularly in habeas cases, and (2) that the DTA would be an unconstitutional "suspension" of the writ of habeas corpus. Four Justices noted that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to lawfully try enemy combatants and discussed the applicability of Article 75 of Additional Protocol I to the Geneva Conventions.

Excerpts follow from the Court's analysis of the applicability of the UCMJ and the Geneva Conventions to the military commission (most footnotes and citations to other

submissions omitted). Further developments in the case are discussed in (d)(1)(i) below.

---

* * * *

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. *Id.*, at 57834. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment

or death." *Ibid.* The November 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order. . . .

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. . . .

* * * *

. . . [A] Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant."[1] Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. . . .

The Court of Appeals for the District of Columbia Circuit reversed. . . .

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

* * * *

[III] . . . [T]this Court's decision in [*Ex parte Quirin,* 317 U.S. 1 (1942)] is the most relevant precedent. In *Quirin*, seven German saboteurs were captured upon arrival by submarine in New York and Florida. 317 U.S., at 21, 63 S. Ct. 2, 87 L. Ed. 3. The President convened a military commission to try the saboteurs, who then

[1] An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal § *a* (Jul. 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

filed habeas corpus petitions in the United States District Court for the District of Columbia challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals before judgment. See *id.*, at 19, 63 S. Ct. 2, 87 L. Ed. 3. Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, "[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay." *Ibid.*

As the Court of Appeals here recognized, *Quirin* "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." 415 F.3d at 36. The circumstances of this case, like those in *Quirin*, simply do not implicate the "obligations of comity" that, under appropriate circumstances, justify abstention. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) (Kennedy, J., concurring).

* * * *

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. See W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920) (hereinafter Winthrop). . . .

* * * *

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 121, 18 L. Ed. 281 (1866). . . .

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning

Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*

> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." 71 U.S. 2, 139-140, 4 Wall., at 139-140, 18 L. Ed. 281.

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. 317 U.S., at 28, 63 S. Ct. 2, 87 L. Ed. 3 . . . Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

> "Jurisdiction of courts-martial not exclusive.
> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses

> that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." 64 Stat. 115.

. . . [T]he *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war. See 317 U.S., at 28-29, 63 S. Ct. 2, 87 L. Ed. 3. That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. See *ibid.*

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, see *id.*, at 518, 124 S. Ct. 2633, 159 L. Ed. 2d 578; *Quirin*, 317 U.S., at 28-29, 63 S. Ct. 2, 87 L. Ed. 3; see also *Yamashita*, 327 U.S., at 11, 66 S. Ct. 340, 90 L. Ed. 499, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ. Cf. *Yerger,* 8 Wall., at 105, 105, 19 L. Ed. 332 ("Repeals by implication are not favored"). [24]

Likewise, the DTA cannot be read to authorize this commission. . . . [T]he statute . . . pointedly reserves judgment on whether

[24] On this point, it is noteworthy that the Court in *Ex parte Quirin*, . . . looked beyond Congress' declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances. . . .

"the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws." [DTA § 1005(e)(3)]

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

* * * *

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin*, 317 U.S., at 28, 63 S. Ct. 2, 87 L. Ed. 3—including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U.S., at 20-21, 23-24, 66 S. Ct. 340, 90 L. Ed. 499. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005—after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. § 4(A)(1). The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. § 4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher." §§ 4(C)(2)-(3).

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§ 5(A)-(P). These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . .; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3). Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. *Ibid.*

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." § 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§ 6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§ 6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." § 6(D)(5)(b). Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members. § 6(D)(1).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt.

A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). § 6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused. *Ibid.*

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

* * * *

First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision" before a federal court under the DTA. See § 1005(e)(3), 119 Stat. 2743. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them

has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. See Reply Brief for Petitioner 12; App. to Pet. for Cert. 45a. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, *e.g.*, 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). . . .

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. See 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499. The force of that precedent, however, has been seriously undermined by post-World War II developments.

* * * *

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See *id.*, at 41-81, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., joined by Murphy, J., dissenting). Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.*, at 49, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J.).

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat. 2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U.S., at 20, 66 S. Ct. 340, 90 L. Ed. 499, nor a protected prisoner of war being tried for crimes committed during his detention, *id.*, at 21, 66 S. Ct. 340, 90 L. Ed. 499.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position, and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 413 (1960) (hereinafter GCIII Commentary) (explaining that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Convention, including this Court's decision in *Yamashita*). The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See Winthrop 835, n 81. That understanding is reflected in Article 36 of the UCMJ. . . .

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions

must be the same as those applied to courts-martial unless such uniformity proves impracticable.

* * * *

The President here has determined, pursuant to [10 U.S.C. §836(a)], that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," § 836(a), to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if [§836(b)]'s requirements [that rules applied in courts-martial, provost courts, and military commissions be "uniform insofar as practicable] may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U.S.C. A. § 839(c) (Supp. 2006). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U.S.C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order

No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

. . . Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, [*Schlesinger v. Councilman*, 420 U.S. 738 (1975)] abstention is appropriate. . . . [F]or the reasons that follow, we hold that neither of the other grounds the Court of Appeals gave for its decision is persuasive.

i

The Court of Appeals relied on *Johnson v. Eisentrager,* 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.*, at 789, 70 S. Ct. 936, 94 L. Ed. 1255. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the

1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.*, at 790, 70 S. Ct. 936, 94 L. Ed. 1255.

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14, 70 S. Ct. 936, 94 L. Ed. 1255.

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F.3d at 40.

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right. For, regardless of the nature of the rights conferred on Hamdan, cf. *United States v. Rauscher,* 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi,* 542 U.S., at 520-521, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. See 415 F.3d at 41-42. We . . . disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U.S.T., at 3318.[59] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"—*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party[62] to the

[59] For convenience's sake, we use citations to the Third Geneva Convention only.

* * * *

[62] The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *Id.*, at 3318. One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Ibid.*

. . . The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U.S.T., at 3318 (Art. 2, P 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, P 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. . . .

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.*, a civil war, see GCIII Commentary 36-37, the commentaries also make clear "that the scope of the Article must be as wide as possible," *id.*, at 36. In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version

of the Article, which coupled broader scope application with a narrower range of rights than did earlier proposed iterations. See GCIII Commentary 42-43.

iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T., at 3320 (Art. 3, P 1(d)). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted"); see also *Yamashita*, 327 U.S., at 44, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for a particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

. . . At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." *Post*, at ____, 165 L. Ed. 2d, at 786. As we have explained, see Part VI-C, *supra*, no such need has been demonstrated here.

* * * *

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed,

moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

* * * *

(2) Subsequent executive and congressional actions

(i) Department of Defense statement

On July 7, 2006, Deputy Secretary of Defense Gordon England issued a memorandum requesting that staff take steps to ensure compliance with Common Article 3 of the Geneva Conventions, stating:

> The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.
>
> It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3. . . .
>
> You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.

The full text of Mr. England's memorandum is available at *www.state.gov/s/l/c8183.htm*.

(ii) President's statement on transfer of certain detainees to Guantanamo and need for military commission legislation

On September 6, 2006, President George W. Bush held a news conference in which he announced that all detainees then being held by the U.S. Central Intelligence Agency in an undisclosed program outside the United States were being transferred to Guantanamo. He also announced that he was submitting legislation to Congress to create military commissions to replace those the Supreme Court had rejected in *Hamdan* so that these and other suspected terrorists could be tried for crimes they stood accused of committing. In addition, he explained that the proposed legislation would amend existing law to provide clear standards and protections for military and intelligence personnel involved in capturing and questioning terrorists in order to preserve the CIA program for future use. Excerpts below from the President's remarks address these issues as well as issues related to Guantanamo, including efforts to return some individuals then held in the detention facilities there.

The full text of the President's remarks and related fact sheets are available at 42 WEEKLY COMP. PRES. DOC. 1569 (Sept. 11, 2006). *See also* September 7 press briefing on detainee issues and military commission legislation by John Bellinger, III, State Department Legal Adviser, available at *www.state.gov/s/l/c8183.htm*.

* * * *

The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning.

In this new war, the most important source of information on where the terrorists are hiding and what they are planning is the terrorists, themselves. Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. . . . [T]his is intelligence that cannot be found any other place. And our security depends on getting this kind of information. To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

After the 9/11 attacks, our coalition launched operations across the world to remove terrorist safe havens, and capture or kill terrorist operatives and leaders. Working with our allies, we've captured and detained thousands of terrorists and enemy fighters in Afghanistan, in Iraq, and other fronts of this war on terror. . . . [T]hese are enemy combatants, who were waging war on our nation. We have a right under the laws of war, and we have an obligation to the American people, to detain these enemies and stop them from rejoining the battle.

Most of the enemy combatants we capture are held in Afghanistan or in Iraq, where they're questioned by our military personnel. Many are released after questioning, or turned over to local authorities—if we determine that they do not pose a continuing threat and no longer have significant intelligence value. Others remain in American custody near the battlefield, to ensure that they don't return to the fight.

In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks. Many are al Qaeda operatives or Taliban fighters trying to conceal their identities, and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts, and—when appropriate—prosecuted for terrorist acts.

Some of these individuals are taken to the United States Naval Base at Guantanamo Bay, Cuba. . . . These aren't common criminals, or bystanders accidentally swept up on the battlefield—we

have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo. Those held at Guantanamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people. . . .

In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. This group includes individuals believed to be the key architects of the September the 11th attacks, and attacks on the USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world. These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks. The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know.

Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country. I can say that questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks—here in the United States and across the world. . . .

[As one example,] [w]ithin months of September the 11th, 2001, we captured a man known as Abu Zubaydah. We believe that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden. . . .

* * * *

We knew that Zubaydah had . . . information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department

of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Zubaydah was questioned using these procedures, and soon he began to provide information on key al Qaeda operatives, including information that helped us find and capture more of those responsible for the attacks on September the 11th. For example, Zubaydah identified one of [Khalid Sheikh Mohammed]'s accomplices in the 9/11 attacks—a terrorist named Ramzi bin al Shibh. The information Zubaydah provided helped lead to the capture of bin al Shibh. And together these two terrorists provided information that helped in the planning and execution of the operation that captured Khalid Sheikh Mohammed.

* * * *

This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws. This program has received strict oversight by the CIA's Inspector General. A small number of key leaders from both political parties on Capitol Hill were briefed about this program. All those involved in the questioning of the terrorists are carefully chosen and they're screened from a pool of experienced CIA officers. Those selected to conduct the most sensitive questioning had to complete more than 250 additional hours of specialized training before they are allowed to have contact with a captured terrorist.

I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it—and I will not authorize it. Last year, my administration worked with Senator John McCain, and I signed into law the Detainee Treatment Act, which established the legal standard for treatment of detainees wherever they are held. I support this act. And as we implement this law, our government will continue to use every lawful method to obtain

intelligence that can protect innocent people, and stop another attack like the one we experienced on September the 11th, 2001.

The CIA program has detained only a limited number of terrorists at any given time—and once we've determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments. Others have been accused of terrible crimes against the American people, and we have a duty to bring those responsible for these crimes to justice. So we intend to prosecute these men, as appropriate, for their crimes.

Soon after the war on terror began, I authorized a system of military commissions to try foreign terrorists accused of war crimes. Military commissions have been used by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military. . . . [This past June] [t]he Supreme Court [in *Hamdan*] determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress.

So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes. My administration has been working with members of both parties in the House and Senate on this legislation. We put forward a bill that ensures these commissions are established in a way that protects our national security, and ensures a full and fair trial for those accused. The procedures in the bill I am sending to Congress today reflect the reality that we are a nation at war, and that it's essential for us to use all reliable evidence to bring these people to justice.

. . . I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. . . .They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence

officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.

We'll also seek to prosecute those believed to be responsible for the attack on the USS Cole, and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania. With these prosecutions, we will send a clear message to those who kill Americans: No [matter] how long it takes, we will find you and we will bring you to justice. . . .

These men will be held in a high-security facility at Guantanamo. The International Committee of the Red Cross is being advised of their detention, and will have the opportunity to meet with them. Those charged with crimes will be given access to attorneys who will help them prepare their defense—and they will be presumed innocent. While at Guantanamo, they will have access to the same food, clothing, medical care, and opportunities for worship as other detainees. They will be questioned subject to the new U.S. Army Field Manual, which the Department of Defense is issuing today. And they will continue to be treated with the humanity that they denied others.

As we move forward with the prosecutions, we will continue to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer. But one of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated—or they will not return to the battlefield, as more than a dozen people released from Guantanamo already have. We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay.

* * * *

. . . The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain

critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.

. . . There are two reasons why I'm making these limited disclosures today. First, we have largely completed our questioning of the men—and to start the process for bringing them to trial, we must bring them into the open. Second, the Supreme Court's recent decision has impaired our ability to prosecute terrorists through military commissions, and has put in question the future of the CIA program. In its ruling on military commissions, the Court determined that a provision of the Geneva Conventions known as "Common Article Three" applies to our war with al Qaeda. This article includes provisions that prohibit "outrages upon personal dignity" and "humiliating and degrading treatment." The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act—simply for doing their jobs in a thorough and professional way.

This is unacceptable. Our military and intelligence personnel go face to face with the world's most dangerous men every day. . . . [W]e owe them clear rules, so they can continue to do their jobs and protect our people.

So today, I'm asking Congress to pass legislation that will clarify the rules for our personnel fighting the war on terror. First, I'm asking Congress to list the specific, recognizable offenses that would be considered crimes under the War Crimes Act—so our personnel can know clearly what is prohibited in the handling of terrorist enemies. Second, I'm asking that Congress make explicit that by following the standards of the Detainee Treatment Act our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions. Third, I'm asking that Congress make it clear that captured terrorists cannot use the Geneva Conventions as a basis to sue our personnel in courts—in U.S. courts. The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs.

The need for this legislation is urgent. We need to ensure that those questioning terrorists can continue to do everything within the limits of the law to get information that can save American lives. . . .

* * * *

(iii) Updated military guidance

On September 5, 2006, the Department of Defense issued Directive No. 2310.01E, "The Department of Defense Detainee Program." Article 4.2 of the directive states:

> All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 ([Geneva Conventions I—IV], full text of which is found in Enclosure 3), as construed and applied by U.S. law, and those found in Enclosure 4, in the treatment of all detainees, until their final release, transfer out of DoD control, or repatriation. Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . .

Enclosure 4, "Detainee Treatment Policy," is set forth below. The full text of the directive, with enclosures, is available at *www.dtic.mil/whs/directives/corres/html/231001.htm*.

E4.1. In addition to the requirements in paragraph 4.2 and Enclosure 3 [setting forth the text of Common Article 3], DoD policy relative to the minimum standards of treatment for all detainees in the control of DoD personnel (military, civilian, or contractor employee) is as follows:

E4.1.1. All persons captured, detained, interned, or otherwise in the control of DoD personnel during the course of military operations will be given humane care and treatment from the

moment they fall into the hands of DoD personnel until release, transfer out of DoD control, or repatriation, including:

E4.1.1.1. Adequate food, drinking water, shelter, clothing, and medical treatment;

E4.1.1.2. Free exercise of religion, consistent with the requirements of detention;

E4.1.1.3. All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.

E4.1.2. All persons taken into the control of DoD personnel will be provided with the protections of Reference (g) [Geneva Convention Relative to the Treatment of Prisoners of War] until some other legal status is determined by competent authority.

E4.1.3. The punishment of detainees known to have, or suspected of having, committed serious offenses will be administered in accordance with due process of law and under legally constituted authority.

E4.1.4. The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation.

On September 6, 2006, the Department of the Army issued revised U.S. Army Field Manual FM 2-22.3, "Human Intelligence Collector Operations," referred to in President Bush's remarks, addressing interrogation techniques applicable to anyone in Defense Department custody anywhere in the world. The full text of the field manual is available at *www.army.mil/usapa/doctrine/34_Series_Collection_1.html.*[*] At the end of 2006, the Departments of Defense and Justice were finalizing a regulations manual for the military commissions.

---

* Although initially marked "For Official Use Only (FOUO)," the manual has been made publicly available. As explained in a Department of the Army press release of September 6, 2006, "The U.S. Army has published this Field Manual in the interest of full transparency. The 'FOUO' markings are no longer operative." The press release is available at *www.globalsecurity.org/military/library/news/2006/09/mil-060906-army01.htm*.

18-Cummins-Chap18.indd 1164 10/22/07 11:50:24 PM

On September 7, Deputy Assistant Secretary of Defense for Detainee Affairs Cully Stimson and Army Deputy Chief of Staff for Intelligence Lieutenant General John Kimmons provided a press briefing on Directive 2310.01E and the Army Field Manual, available at *www.globalsecurity.org/security/library/news/2006/09/sec-060906-dod02.htm*. Excerpts from remarks by both briefers follow.

Mr. Stimson:

* * * *

. . . [Directive 2310] historically has defined how the department conducts detention operations in a traditional war. The revised version, the version before you today, sets forth the policies and responsibilities for all detention operations conducted by [the Department of Defense ("DOD")], but provides the flexibility we need to fight any foe while, as I said, affirming the values and practices that are at the heart of what we do.

This directive is the cornerstone of DOD detention policy, and that's important to understand. The Army Field Manual, for instance, falls under this DOD directive. It sets out policy guidance for all DOD detention operations that is necessary and appropriate to ensure the safe, secure, and humane detention of enemy combatants, both lawful and unlawful, regardless of the nature of the conflict. It consolidates existing direction and instructions of the President and the Secretary of Defense, and incorporates the lessons we have learned over the past few years in waging the global war on terror. It does so in a number of ways. It incorporates key policy changes recommended in the 12 major investigations conducted by DOD over the past two years. In fact, by publishing this document and the Army Field Manual, we will have addressed over 95 percent of the recommendations from those 12 major investigations since Abu Ghraib. . . .

First, and foremost, the directive describes the core policies that this department believes are critical in ensuring that all detainees are treated humanely, and that the laws pertaining to detainee care and treatment are implemented. It incorporates the

prohibitions against cruel, inhumane, and degrading treatment or punishment of the Detainee Treatment Act, and articulates, for the first time in DOD history, a minimum standard for the care and treatment of all detainees.

* * * *

General Kimmons:

* * * *

. . . [T]he Army has taken pretty dramatic steps over the last two and a half years to improve our human intelligence capabilities and capacity, to include interrogation, but not limited to that. And by interrogation, I really mean getting truthful answers to time-sensitive questions on the battlefield. . . .

* * * *

The new Field Manual incorporates a single standard for humane treatment, as was alluded to, for all detainees, regardless of their status under all circumstances, in conjunction with all interrogation techniques that are contained within it—and there are no others. That is as a matter of law, to include the Detainee Treatment Act of 2005, in accordance with the Geneva Conventions, to include Common Article 3, as well as Department of Defense policy and service doctrine.

The Field Manual explicitly prohibits torture or cruel, inhumane, and degrading treatment or punishment. To make this more imaginable and understandable to our soldiers—and I use that in a joint context—we have included in the Field Manual specific prohibitions. There's eight of them: interrogators may not force a detainee to be naked, perform sexual acts or pose in a sexual manner; they cannot use hoods or place sacks over a detainees head or use duct tape over his eyes; they cannot beat or electrically shock or burn them or inflict other forms of physical pain—any form of physical pain; they may not use water boarding, they may not use hypothermia or treatment which will lead to heat injury; they will not perform mock executions; they may not deprive detainees of the necessary food, water and medical care; and they may not use dogs in any aspect of interrogations. As you know, dogs can be

used legally by our military police for security, but not as an adjunct part of the interrogation process.

The interrogation approach techniques in this Field Manual have undergone favorable interagency legal review and been judged to be consistent with the requirements of law, Detainee Treatment Act, and the Geneva Conventions, as well as policy. The Field Manual was reviewed and endorsed by senior DOD figures at the secretarial level, by the Joint Staff, by each of the combatant commanders and their legal advisers, by each of the service secretaries and service chiefs and their legal advisers, in addition to the Director of Defense Intelligence Agency and the Director of National Intelligence, who coordinated laterally with the CIA. It's also been favorably reviewed by the Department of Justice. The Field Manual contains 19 interrogation approaches. No other techniques are authorized within the Department of Defense. Sixteen of these are traditional interrogation approaches which were enshrined in the old Field Manual 34-52.

Based on battlefield lessons learned, we have added two additional approaches to the main body of the field manual, and those are Mutt and Jeff, good cop/bad cop, and false flag, portraying yourself as someone other than an American interrogator. Those were added for general-purpose use across all detainee categories.

Those 18 techniques are authorized for use Department of Defense-wide and worldwide, regardless of status.

Our four-star combatant commanders also specifically requested, based on battlefield experience, that we include one restricted technique called separation, for use on a by-exception basis only with unlawful enemy combatants. That is, it's not authorized for use on prisoners of war and other protected persons.

Separation allows interrogators to keep unlawful enemy combatants apart from each other as a normal part of the interrogation process, so they can't coordinate their stories and so that we can compare answers to questions that interrogators have posed to each other without there having been collusion. It's for the same reason that police keep murder suspects separated while they're questioning them, although this is within an interrogation context.

Separation meets the standard for humane treatment, the single standard that exists across DOD, and it is enshrined in this manual. But the Geneva Conventions afford additional protections—privileges, if you will—to legal or to lawful combatants above and beyond the humane standard. It authorizes lawful combatants to receive mail and send packages. It authorizes them to receive pay for work that they perform. It also protects them from being separated from their fellow prisoners of war with whom they were captured, without their express consent.

* * * *

. . . [S]pecial interrogator training and certification is required for our interrogators to use this restricted approach. A very high level of command oversight is also required. . . .

* * * *

The Field Manual makes clear that commanders of forces which conduct detention operations or interrogation operations are directly accountable and responsible for humane detainee treatment in addition to their other command responsibilities. It emphasizes the responsibility of every service member to report observed, suspected or alleged detainee abuse, and it tells them how to do it. It also gives them guidance on how to report if they suspect their chain of command is complicit.

* * * *

(iv) Military Commissions Act

On October 17, 2006, President George W. Bush signed into law the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006). In signing the bill into law, the President stated:

> The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives like Khalid Sheikh Mohammed, the man believed to be the mastermind of the September the 11th,

> 2001 attacks on our country. This program has been one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country. And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come. The Military Commissions Act will also allow us to prosecute captured terrorists for war crimes through a full and fair trial.

The full text of the President's remarks is available at 42 WEEKLY COMP. PRES. DOC. 1831 (Oct. 23, 2006).

Section 3 of the MCA added a new Chapter 47A, entitled "Military Commissions," to title 10, United States Code. The new chapter "establishes procedures governing the use of military commissions" (10 U.S.C. § 948b(a)), authorizes the President to establish such military commissions (§ 948b(b)), and provides jurisdiction "to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001" (§ 948d(a)). Section 984b also provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."

Among other things, §§ 950c and 950d provide for review by a Court of Military Commission Review, to be established by the Secretary of Defense (§950f). New section 950g provides for review of final military commission judgments by the U.S. Court of Appeals for the District of Columbia Circuit and the Supreme Court, as follows:

> (a) Exclusive Appellate Jurisdiction.—
>
> (1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.
>
> (B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(b) Standard for Review.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

(c) Scope of Review.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution and the laws of the United States.

(d) Supreme Court.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

Section 5, "Treaty Obligations Not Establishing Grounds for Certain Claims," provides:

In General.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

Section 6, "Implementation of Treaty Obligations," provides as excerpted below concerning Common Article 3.

(a) Implementation of Treaty Obligations.—

(1) In general.—The acts enumerated in subsection (d) of section 2441 of title 18, United States Code, as added by subsection (b) of this section, and in subsection (c) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(2) Prohibition on grave breaches.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third

Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.

(3) Interpretation by the president.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

* * * *

(b) Revision to War Crimes Offense Under Federal Criminal Code. (1) In general.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3): "(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or"; and

(B) by adding at the end the following new subsection: "(d) Common Article 3 Violations.—

"(1) Prohibited conduct.—In subsection (c)(3), the term 'grave breach of common Article 3' means any conduct (such

conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

"(A) Torture.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

"(B) Cruel or inhuman treatment.—The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

"(C) Performing biological experiments.—The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

"(D) Murder.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

"(E) Mutilation or maiming.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

"(F) Intentionally causing serious bodily injury.—The act of a person who intentionally causes, or conspires or attempts to

cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

"(G) Rape.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

"(H) Sexual assault or abuse.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

"(I) Taking hostages.—The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons."

* * * *

(2) Retroactive applicability.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105-118 (as amended by section 4002(e)(7) of Public Law 107-273).

(c) Additional Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment.—

(1) In general.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) Cruel, inhuman, or degrading treatment or punishment defined.—In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States,

as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(3) Compliance.—The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.

Section 7, "Habeas Corpus Matters," provides as set forth below.

(a) In General.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by . . . section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

(b) Effective Date.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

A fact sheet prepared by the Department of State described the Military Commissions Act as excerpted below.

The full text of the fact sheet is available at *www.state.gov/s/l/c8183.htm*. *See also* remarks by Legal Adviser John Bellinger at Harvard Law School, "Military Commissions Act: Legislation and Implication," available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The Act provides for military commissions and interrogation/treatment standards that are fully consistent with the Geneva Conventions, and in particular "Common Article 3." Common Article 3 is an article that is common to all four 1949 Geneva Conventions and applies to non-international armed conflicts. Common Article 3 prohibits, among other things, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," the "taking of hostages," and "outrages upon personal dignity, in particular, humiliating and degrading treatment." It also requires that trials be held by "regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

The Substance of the Act

- The legislation establishes military commission procedures for trying alien unlawful enemy combatants, including members of al Qaeda, in a way that fully complies with Common Article 3 of the Geneva Conventions, which the Supreme Court has said applies to the conflict with al Qaeda.
- The legislation incorporates numerous due process safeguards for defendants, including the following:
    - o An extensive appeals process, which includes the right of any defendant to appeal a final military commission judgment against him to a U.S. federal appeals court.
    - o A right to be present throughout the trial. Evidence admitted against an accused must be shared with the accused.
    - o A presumption of innocence.
    - o A right to represent oneself.
    - o A right to cross-examine prosecution witnesses.
    - o A prohibition on double jeopardy.

  - An absolute bar on the admission of statements obtained through torture.
  - A bar on coerced testimony unless the judge finds it probative, reliable, and that the interests of justice would be best served by admitting the statement. For statements made after the Detainee Treatment Act was enacted, the judge must also find that it was not obtained through cruel, inhuman or degrading treatment or punishment.
  - A prohibition against compelling a defendant to testify against himself.
  - Access to counsel, including a qualified military defense counsel provided at no cost and the opportunity to retain a civilian defense counsel who meets certain requirements.
- The legislation criminalizes serious violations of Common Article 3, and in so doing defines those terms. This will give greater clarity to U.S. officials who work in detention and interrogation operations. Acts that are defined criminal offenses under the draft legislation include "torture," "cruel or inhuman treatment," "performing biological experiments," "murder," "mutilation or maiming," "intentionally causing serious bodily injury," "rape," and "sexual assault or abuse." The legislation's definitions of these offenses are entirely consistent with international law.
- The legislation does not authorize torture or harsh interrogation techniques that would otherwise be prohibited by U.S. law or U.S. treaty obligations. As the President has stated on numerous occasions, the United States does not engage in or condone torture anywhere.
- The Act does not provide absolute immunity for any individual, including those working for or with our intelligence agencies. Anyone who has committed a crime while interrogating detainees may be prosecuted under criminal law, including the torture statute or the War Crimes Act.
- The legislation cuts off habeas review (a specific and limited form of review generally available to prisoners in our civilian justice system). However, the legislation preserves an unlawful combatant's right to appeal to our federal courts a Combatant Status Review Tribunal decision that he is an enemy combatant. This right serves a similar function to habeas and exceeds

United States obligations under international law. The bill also explicitly provides that unlawful enemy combatants have the right to challenge their convictions in our federal courts.

- The legislation does not reinterpret or change the meaning of Common Article 3 of the Geneva Conventions. The President and Congress share the view that the military commissions and any interrogation standards must comply with Common Article 3 and cannot constitute cruel, inhuman, or degrading treatment or punishment.

d. Further litigation related to Guantanamo detainees

(1) Unlawful enemy combatants

(i) Hamdan v. Rumsfeld

On December 13, 2006, the U.S. District Court for the District of Columbia, on remand from the Supreme Court (*see* (c)(1) *supra*), dismissed Hamdan's petition for habeas corpus, concluding (fn. omitted):

> Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional, in the absence of rebellion or invasion), but Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus. Hamdan's habeas petition must accordingly be dismissed for want of subject matter jurisdiction.

Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006). Further excerpts below from the court's opinion address Hamdan's lack of constitutional entitlement to habeas corpus (footnotes and citations to submissions to the court omitted).

---

* * * *

The jurisdiction of federal courts over the habeas petitions of detainees at Guantanamo Bay rested upon the grant of jurisdiction in the habeas statute and upon the United States' exercise of "complete jurisdiction and control" over the Navy base in Cuba. *Rasul*, 542 U.S. 466, 471, 481, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004). . . .

. . . Not one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States—or in "territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475—had a common law or constitutionally protected right to the writ of habeas corpus.

* * * *

In American habeas actions, alien petitioners have had access to the writ largely because they resided, lawfully or unlawfully, on American soil. . . . Hamdan has been a prisoner of the United States for five years. He has lived nearly all of that time within the plenary and exclusive jurisdiction of the United States, but he has not become a part of the population enough to separate himself from the common law tradition generally barring non-resident enemy aliens from accessing courts in wartime. *See Ex parte Kawato*, 317 U.S. 69, 72-75, 63 S. Ct. 115, 87 L. Ed. 58 (1942) (describing common law rule). His detention in Guantanamo, in other words, has not meaningfully "increase[d] his identity with our society." *Eisentrager v. Johnson,* 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950).

It is the *Eisentrager* case that appears to provide the controlling authority on the availability of constitutional habeas to enemy aliens. In that case, petitioners were Germans living in China in the aftermath of World War II. *Id.* at 765. After trial before a United States Military Commission in China, they were convicted of war crimes and sent to occupied Germany to serve their sentences. *Id.* at 766. The Supreme Court held that they had no constitutional entitlement to habeas relief in U.S. Courts because "at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.

* * * *

Hamdan's lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique. Nevertheless, as the government argues in its reply brief, his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus. Petitioner has never entered the United States and accordingly does not enjoy the "implied protection" that accompanies presence on American soil. *Eisentrager*, 339 U.S. at 777-79. Guantanamo Bay, although under the control of the United States military, remains under "the ultimate sovereignty of the Republic of Cuba." *Rasul*, U.S. 542 at 471. Presence within the exclusive jurisdiction and control of the United States was enough for the Court to conclude in *Rasul* that the broad scope of the habeas statute covered Guantanamo Bay detainees, but the detention facility lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a constitutionally guaranteed writ. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S. Ct. 216, 81 L. Ed. 255 (1936). There is no dispute, moreover, that Hamdan's presence within the exclusive jurisdiction of the United States has been involuntary. Presence within the United States that is "lawful but involuntary [] is not of the sort to indicate any substantial connection with our country" that would justify the invocation of a constitutional right to habeas corpus, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

* * * *

(ii) Boumediene v. United States

On October 18, 2006, the U.S. Court of Appeals for the District of Columbia Circuit issued an order granting leave to file supplemental briefs on the significance of the MCA in consolidated appeals in cases concerning petitions for writs of habeas corpus filed by foreign nationals held at Guantanamo. *Boumediene v. Bush*, No.05-5062. *See* discussion of lower court decisions in *Digest 2005* at 995-1016.

The U.S. Supplemental Reply Brief Addressing the Military Commissions Act, filed November 13, 2006, provided

its views that (1) the MCA unambiguously eliminates district court jurisdiction over the petitioners' claims; (2) the MCA does not violate the Suspension Clause of the U.S. Constitution because the detainees have no constitutional rights and Congress has provided an adequate substitute; (3) the MCA provision clarifying that the Geneva Conventions are not judicially enforceable is fully consistent with Congress's legislative authority under the Constitution; and (4) detainees' arguments relating to the ability to challenge military commissions are not before this court and are without merit. Excerpts below from the U.S. brief address the petitioners' lack of constitutional habeas rights and the adequacy of the review provided as a substitute (footnotes and citations to submissions in the case omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

A. Petitioners fundamentally err in simply assuming that aliens detained overseas as enemy combatants have constitutional habeas rights protected by the Suspension Clause.

1. Traditionally, there has been no constitutional right to seek habeas review over a military decision to hold an alien enemy as a prisoner during armed conflict. *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty"). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court held that aliens, detained as enemies outside the United States, are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." *Id.* at 777; *see also id.* at 781 ("no right to the writ of habeas corpus appears"). The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment. *Id.* at 777-779, 784-785. In rejecting the assertion of such a constitutional habeas right, the Court emphatically stated that such a

constitutional entitlement "would hamper the war effort and bring aid and comfort to the enemy* * *." *Id.* at 779. The Court explained, "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990), the Supreme Court reaffirmed *Eisentrager's* constitutional holding that aliens outside the United States have no rights under the U.S. Constitution. . . . Following these precedents, this Court consistently has held that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (citation omitted).

Thus, the holding of *Eisentrager* is controlling here. Petitioners are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas." 339 U.S. at 777. Thus, the withdrawal of habeas jurisdiction does not implicate the Suspension Clause.

* * * *

B.1. Under *Eisentrager*, Congress could have simply withdrawn jurisdiction over these matters and left the decision of whether to detain enemy aliens held abroad to the military, as has been the case traditionally. The MCA and DTA, however, take the extraordinary and unprecedented additional step of granting these petitioners—enemy aliens held outside the United States—the right to obtain judicial review of the enemy combatant tribunal determinations.

* * * *

. . . [T]he MCA and DTA, while eliminating district court jurisdiction, afford petitioners here an unprecedented level of judicial review for an enemy alien captured during an armed conflict. As part of that DTA review, petitioners can challenge the lawfulness, under the U.S. Constitution and U.S. law, of any aspect of the

CSRT process. We have argued (and continue to argue) that petitioners have no constitutional rights in this context, but petitioners can plead their arguments to the contrary to this Court, and this Court can resolve that issue.

Even assuming petitioners have constitutional habeas rights (contrary to the holding of *Eisentrager*), the Supreme Court has held that Congress may freely repeal habeas jurisdiction, if it affords an adequate and effective substitute remedy. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). As we explained in our prior supplemental briefs regarding the DTA, there is no possible Suspension Clause violation here because the statutory review for constitutional and other legal claims afforded under 1005(e)(2)(C)(ii) of the DTA provides these petitioners with *greater rights* of judicial review than that traditionally afforded to those convicted of war crimes by a military commission.

* * * *

In arguing that the DTA review would be inadequate in their latest briefs, petitioners complain about the nature of the CSRT process, the enemy combatant definition used by the CSRTs, and the types of material submitted to the CSRTs. All of these issues, however, can be asserted in this Court under the DTA. This Court can determine the nature of petitioners' rights, if any, under "laws of the United States" and the U.S. Constitution, and can adjudicate whether the CSRT process violated any applicable rights. *See* DTA, § 1005(e)(2). These legal arguments, regarding the CSRT process, have already been fully briefed in this case and should be decided forthwith by this Court in these cases under its exclusive DTA jurisdiction.

3. Petitioners erroneously contend that, because they have not been criminally convicted, habeas relief entitles them to a "searching factual inquiry"—including apparently discovery and a *de novo* judicial trial—into whether or not they are enemy combatants. In so arguing, petitioners ignore the reality that such *de novo* trials, reviewing military tribunal rulings that aliens captured abroad during an armed conflict are enemy combatants, "would hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779. Petitioners also ignore the controlling Supreme

Court precedent specifying the nature of habeas review of a military tribunal decision. As discussed above, the Supreme Court has repeatedly held that, even under habeas review of a military tribunal ruling regarding an enemy alien, a court may not examine the guilt or innocence of the defendant, or the sufficiency of the evidence. *See Yamashita*, 327 U.S. at 8, 17; *Ex parte Quirin*, 317 U.S. at 25.

* * * *

In accord with *Hamdi* and *Yamashita*, the MCA and DTA were enacted to ensure that, while each detainee is afforded his day in court, the substantive decision of whether to consider an alien captured during an armed conflict an enemy remains a military decision. *See* 152 Cong. Rec. S10266 (daily ed. Sept. 27, 2006) (Sen. Graham) ("[t]he role of the courts in a time of war is to pass muster and judgment over the processes we create—not substituting their judgment for the military"); *id.* at S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence—the knowledge of the battlefield and the nature of our foreign enemies—to judge whether particular facts show that someone is an enemy combatant").

* * * *

. . . Congress in the DTA and MCA has recognized that these military tribunals, the CSRTs, provide the authoritative military adjudication of whether the detainees held at the Guantanamo Bay Naval Base should be treated as enemy combatants. Congress has authorized courts to review the legality of the CSRT process and whether the CSRT decision was consistent with the standards adopted by the Defense Department. To argue that, despite this congressional recognition of the CSRTs and the calibrated review scheme for the tribunal rulings, there should also be *de novo* district court review of the enemy combatant status, makes no sense. The limited *Yamashita* standard of review would apply in this context (if petitioners had any constitutional habeas rights), and the review afforded by the DTA is far more capacious than that standard.

* * * *

(2) Individuals determined to be no longer enemy combatants

On December 22, 2005, the District Court for the District of Columbia denied a petition for writs of habeas corpus filed by two Muslim Uighurs from China then being held at Guantanamo. *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005). The detainees appealed to the U.S. Court of Appeals for the District of Columbia Circuit. In its brief on appeal, filed March 15, 2006, the United States explained the factual background as follows:

> Petitioners, Abu Bakker Qassim and Adel Abdu Al-Hakim, are ethnic Uighurs and natives of China. They received weapons training in Afghanistan at a military training facility supplied by the Taliban. After the September 11 attack on the United States, as the Northern Alliance forces approached the military training camp, petitioners fled to Pakistan where they were captured. Petitioners were initially determined to be enemy combatants and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. There, each petitioner was granted a hearing before a military Combatant Status Review Tribunal ("CSRT") to review the enemy combatant designation. In March 2005, the CSRTs, after carefully examining all of the information provided by the detainees and the military, determined that petitioners should no longer be classified as enemy combatants. . . .

The district court noted that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners." Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." The court held that it could not issue such relief, however, stating:

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban.

> China is keenly interested in their return. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.

Excerpts follow (most footnotes omitted) from the U.S. brief answering in the affirmative the question on appeal:

> Whether the district court properly dismissed the petition for habeas corpus brought by aliens captured during an armed conflict, where: a) petitioners are being detained at a secure military base while the Government seeks an appropriate country where petitioners can be released; and b) petitioners object to being returned to their native country, and have no immigration status or other right permitting them to enter the United States, and no other country has been identified that will accept them.*

Brief for Appellees, available in full at *www.state.gov/s/l/c8183.htm*.

On May 6, 2006, the United States filed an emergency motion to dismiss the appeal as moot because the Uighurs had been released to Albania earlier that day. The court of appeals granted the motion on August 14, 2006. 466 F.3d 1073 (2006).

* * * *

* Briefing in this case was completed before the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* and the subsequent enactment of the Military Commissions Act, *see* 4.c.(1) and 4.c.(2)(iv) *supra*. As a result, U.S. arguments concerning jurisdiction addressed the Detainee Treatment Act. The U.S. brief also argued that President Bush was not a proper respondent to a habeas petition. Those aspects of the brief are not excerpted here.

18-Cummins-Chap18.indd 1185 10/22/07 11:50:26 PM

A. Petitioners' Detention Is Lawful.

The district court erroneously ruled that petitioners' continued detention was unlawful, but then went on to hold that no habeas relief could be granted in this context. This Court need not reach the latter issue because, as we explain below, the military's continued detention of petitioners, while seeking to place them in an appropriate country, is entirely lawful.

1. In this case, petitioners went to Afghanistan to receive weapons training at a military training facility supplied by the Taliban near Tora Bora. They were receiving that training, but then, as Northern Alliance forces approached the military training camp, fled with others to the nearby Tora Bora caves. They then fled the Tora Bora caves to Pakistan where they were captured by Pakistani forces and turned over to the United States military. *Ibid*.

The Department of Defense screened those captured, determined that petitioners were enemy combatants, and sent them to be detained at the U.S. Naval Base at Guantanamo Bay. This was a reasonable determination given the circumstances of their capture. Petitioners' detention under that factual scenario was authorized by the President's constitutional authority and the AUMF. . . .

* * * *

Petitioners correctly observe that the CSRTs, after thoroughly examining all of the information provided by the military and the detainees, ultimately determined that petitioners should no longer be classified as enemy combatants, as that term was defined and implemented for the purposes of the CSRTs. That conclusion obviously does not mean that petitioners' original detention was inappropriate or unauthorized. Through a process unprecedented in the history of armed conflict, the CSRT procedures constituted a more rigorous examination of the detainees' enemy combatant status based on information available at the time of the review, including any new information gathered subsequent to the detainees' capture. The CSRT rulings regarding petitioners, under DOD instructions, mandate that petitioners no longer be detained as enemy combatants; the rulings do not, however, lead to the conclusion that the prior detention was unlawful.

2. While petitioners are no longer being held at Guantanamo as enemy combatants, the Executive's power to detain enemy combatants necessarily includes the authority to wind up that detention in an orderly fashion after a detainee has been determined to no longer be an enemy combatant or after hostilities have ended. Typically, when a CSRT finds that a detainee should no longer be classified as an enemy combatant, he is then returned to his native country. Petitioners vigorously oppose, however, being sent to their native country, and the United States, consistent with its policy against returning an individual when it is more likely than not they will be tortured, cannot return them to their native country. Thus, they are being detained by the military, pending the outcome of the extensive diplomatic efforts to transfer them to an appropriate country. Those efforts are ongoing and have been given high priority by the Executive Branch. In the meantime, however, it is not unlawful to continue to detain petitioners, until they can be properly resettled.

The district court's conclusion that the United States lacks authority to continue to detain those captured during an armed conflict, where the individuals refuse to and cannot safely be sent back to their native country, while some other venue of relocation is found, is contrary to both history and logic. Historically, the United States armed forces, like the armed forces of our allies, has continued the detention of prisoners of war following the end of major conflicts when the prisoner objects to repatriation in his native country. For example, at the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war refused to return to their native countries, citing fears of execution, imprisonment, or mistreatment in their countries if returned. *See* Charmitz and Wit, *Repatriation o[f] Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1952-1953); Delessert, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1, OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 157-165 (Schulthess 1977). The United Nations Command continued to hold those 100,000 prisoners for more than one and one-half years while it considered whether

and how best to resettle them. *See* Delessert, RELEASE AND REPATRIATION at 163-164. After World War II, Allied Forces spent several years at the end of hostilities dealing with such issues with respect to prisoners of war they detained during the war, including issues regarding thousands of prisoners who did not wish to return to their native countries. *See id.* at 145-156 & n.53 (citing, *inter alia*, the fact that as late as 1948 England held 24,000 German prisoners who did not wish to repatriate); Charmitz and Wit, *Repatriation o[f] Prisoners of War*, 62 Yale L.J. at 401 nn.46 & 48, 404 n.70; Delessert, REPATRIATION OF PRISONERS OF WAR TO THE SOVIET UNION DURING WORLD WAR II: A QUESTION OF HUMAN RIGHTS, IN WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER, 80 (Henry H. Han ed., 1979). Similarly, thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in the prior Gulf War because they refused to be repatriated in their native country. *See* FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, APPENDIX O, at 708 (April 1992) (http://www.ndu.edu/library/epubs/cpgw.pdf) (discussing the more than 13,000 Iraqi POWs who refused repatriation and remained in custody despite the end of hostilities).

Petitioners nevertheless cite to Article 118 of the Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316), which states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities," and Article 132 of the Fourth Geneva Convention (Geneva Convention relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516), which provides, "[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist," as mandating their release into the United States. As we explain below, the Geneva Conventions are not judicially enforceable.[14] In any event, these provisions presuppose that

[14] Moreover, petitioners do not even claim to be "prisoners of war" within the scope of the Third Geneva Convention.

repatriation is possible. Significantly, the International Committee of the Red Cross commentaries explain that the term "without delay" does not speak to the situation where the prisoner refuses to return to their native country. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS: COMMENTARY TO THE CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 541-550 (1960). As to such situations, "[e]ach case must * * * be dealt with individually." *Id.* at 548. The general requirement of return without delay does not "affect the practical arrangements which must be made so that repatriation may take place consistent with humanitarian rules." *Id.* at 550.

* * * *

3. In an effort to show that their continued detention is unlawful, petitioners, like the district court, rely on *Zadvydas v. Davis*, [533 U.S. 678 (2001)], and *Clark v. Martinez*, 543 U.S. 371 (2005). In those cases, however, the Supreme Court construed an immigration statute, which has no application here.

In both *Zadvydas* and *Clark*, the Court interpreted 8 U.S.C. § 1231(a)(6), which provides that "[a]n alien ordered removed who is inadmissible under Section 1182 of this title, removable under Section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period." *See Zadvydas*, 533 U.S. at 688-89; *Clark*, 543 U.S. at 722. In *Zadvydas*, the Court held that this statutory provision "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," 533 U.S. at 689, and that six months after the removal order becomes final constitutes a presumptively reasonable period, *id.* at 701. *Zadvydas* considered only the case of aliens removable under Sections 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), and *Clark* confirmed that this interpretation of the statute applies to the removal of inadmissible aliens being held within the United States. *See* 543 U.S. at 378.

The immigration statute at issue in *Zadvydas* and *Clark*, which speaks to detention of an alien in the United States pending the execution of an immigration removal order, is obviously inapplicable

to petitioners here. Petitioners are *not* being detained under that statute or any other immigration provision. Nor could they be so detained. The immigration statute only applies in the context where an alien has received an immigration removal order. There is no immigration removal order against petitioners. Indeed, they could not be subject to an immigration removal order because they are not in the United States. *See* 8 U.S.C. § 1101(a)(38) (defining the geographic scope of the United States for the purposes of the Immigration and Nationality Act ("INA")); DTA, § 1105(g) (same for purposes of the Detainee Treatment Act).

Even in *Zadvydas*, the Court specifically stated that it was not announcing a rule that would necessarily apply to immigration cases involving "terrorism or other special circumstances where * * * [there would be a need for] heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 695. In *Clark*, the Court expanded upon that statement, explaining that the Court's interpretation of Section 1231(a)(6) would not affect the ability of the Government to detain aliens under other authority. 543 U.S. at 379 n.4. Given that petitioners here are not being held under that statute, the limitation on detention authority under Section 1231(a)(6) recognized in *Zadvydas* and *Clark* has no bearing on petitioners' case.

Moreover, in construing the immigration statute at issue there, the Court in *Zadvydas* relied upon a constitutional avoidance analysis that is inapplicable here. The Court noted that the indefinite detention of an alien within the United States would raise concerns under the Due Process Clause of the Fifth Amendment. *See* 533 U.S. at 690-92. But the Supreme Court explained that the analysis would be very different for persons, like petitioners here, who are outside of the United States, observing that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693. As we have explained, petitioners are aliens outside the United States and the Fifth Amendment—including its Due Process Clause—has no application to them.

The more relevant immigration case is *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953). There, an alien, Mr. Mezei,

who had been a 25-year resident of the United States, left the country to visit his dying mother. The INS found that he could not legally re-enter. Mezei was stopped at the border and then held in detention in the United States because no other country would accept him. He contended that his detention was indefinite and unlawful. Nonetheless, the Court found that Mezei had no constitutional right to release, even though he had been detained more than two years and even though at the time there were no prospects of another country accepting him. The Court held that he had no constitutional or statutory right to release. The Court explained, "[w]hatever our individual estimate of [the policy decision not the release Mezei] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." 345 U.S. at 216. The same rationale applies all the more so here where petitioners are aliens who have never been present in the United States and were captured during an armed conflict.

* * * *

B. The District Court Correctly Held That It Could Not Order Petitioners' Release In this Context.

* * * *

Petitioners are not currently in the United States. The Immigration and Nationality Act defines the "United States" to include only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." *See* 8 U.S.C. § 1101(a)(38). Further, in the Detainee Treatment Act, Congress recognized that, for purposes of judicial review of claims brought by detainees at Guantanamo Bay, the geographic scope of the "United States" should be as defined in Section 101(a)(38) of the INA and "in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). In order to make a "lawful entry * * * into the United States," petitioners would have to be "admitted" to this country. 8 U.S.C. § 1101(a)(13)(A). A court does not have the power to order the

admission of petitioners. *See Fok Yung Yo v. United States*, 185 U.S. 296, 305 (1902) ("Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention").

Petitioners argue that a court can order the Executive to parole an alien into this country from outside the United States. The cases they cite for that proposition, however, all deal with aliens who were already physically present in the United States. Petitioners here are in Cuba. With limited exceptions not relevant here, the Immigration and Nationality Act provides that an alien outside the United States must have a visa in order to enter the country. *See* 8 U.S.C. § 1182(a)(7). Petitioners have no such visas and a court cannot order the Executive to issue them. Under the INA, the issuance of a visa is discretionary: a consular officer "may" issue an immigrant or nonimmigrant visa to an alien who has made a proper application for it. 8 U.S.C. § 1201(a)(1). This decision is not judicially reviewable. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-1160 (D.C. Cir. 1999) (discussing the doctrine of consular nonreviewability and explaining that, under that doctrine, "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise"). As the Supreme Court has held, "[t]he authority to issue visas belongs solely to the consular officers of the United States," and "courts are without authority to displace the consular function in the issuance of visas." *City of New York v. Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989). Accordingly, any "district court[] order that purports to direct the issuance of visas is without force and effect." *Ibid.*

Furthermore, a judicial order requiring the physical production of nonresident alien petitioners within the United States not only would conflict with the specific provisions of the Immigration and Nationality Act, but also would be contrary to over a century of Supreme Court jurisprudence, recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political branches of government. As the Court explained in 1893, "[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). It is "to be regulated by treaty or by act of Congress,

and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." *Ibid; see also Lem Moon Sing v. United States*, 158 U.S. 538, 546-547 (1895).

Because there is no constitutional right to enter the United States or otherwise be present in this country, courts must honor Congress' prescriptions regarding the admission or exclusion of aliens. Indeed, for over a hundred years, the Supreme Court has faithfully refused to permit judicial intervention in this area when Congress has not provided for it. For example, in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), an excluded alien filed a habeas corpus petition challenging the inspecting officer's determination not to admit her. Recognizing the limits on its power, the Court held that, because Congress had provided only for administrative review and not judicial review of inspectors' exclusion determinations, the agency decision to deny admission to Nishimura Ekiu could not be disturbed by the courts.

* * * *

Since a district court may not review and override a denial of admission, it follows *a fortiori* that a court may not arrogate the Executive's authority by ordering admission in the first instance. Nor could a court order that the Government "parole" petitioners, or temporarily admit them into the United States. Although the INA authorizes the parole of aliens who are applying for admission, 8 U.S.C. § 1182(d)(5), the decision to parole—like the decision to admit—is vested solely in the Executive Branch's unreviewable discretion. The INA states that the Secretary of Homeland Security "may * * * in his discretion" parole aliens into the United States if the Secretary finds urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see also* 8 U.S.C. § 1103 (transferring various immigration functions to the Secretary of Homeland Security). Thus, the INA's bar on review of discretionary decisions precludes judicial review of agency parole determinations. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). Aside from admission and parole, there is no way for petitioners to be lawfully present in the United States. Under 8 U.S.C.

§ 1182(a)(9), an alien who "is present in the United States without being admitted or paroled" is "unlawfully present." *See also* 8 U.S.C. § 1182(a)(6)(A) (aliens who have not been "admitted or paroled" are inadmissible). Accordingly, the habeas statute did not give the district court the authority to order petitioners into this country, and the district court therefore properly denied relief to petitioners.

Last year, Congress clarified that this comprehensive preclusion of judicial review over discretionary decisions also encompasses habeas review. In the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended the INA to make explicit that no court has jurisdiction under 28 U.S.C. § 2241 or "any other habeas corpus provision" to review such discretionary decisions. *See* Real ID Act § 106(a); *see also id.* § 101(f)(2) (providing that there is no jurisdiction "regardless of whether the judgment, decision or action is made in removal proceedings"). The Real ID Act eliminates any doubt that the district court lacked jurisdiction to direct the Executive Branch to admit petitioners into the United States.

* * * *

e. Other detainee litigation

(1) Multinational Force-Iraq detainees: Challenges to transfers to Iraqi government

During 2006 two cases before different judges of the U.S. District Court for the District of Columbia raised the question of whether the court had jurisdiction over petitions for writs of habeas corpus brought by U.S. citizens being held by the Multinational Force-Iraq ("MNF-I"), established pursuant to UN Security Council Resolutions 1546 and 1637 in Iraq. In *Omar v. Harvey,* the court held that it had jurisdiction for purposes of granting a preliminary injunction against transfer to Iraqi custody. In *Mohammed v. Harvey*, the court ruled that it had no habeas jurisdiction because the petitioner was not in U.S. custody, expressly disagreeing with the decision in *Omar*. Both decisions were pending on appeal at the end of 2006.

(i) Omar v. Harvey

In *Omar v. Harvey,* 416 F. Supp. 2d 19 (D.D.C. 2006), the court issued a preliminary injunction enjoining the transfer of Shawqi Omar, a dual American-Jordanian citizen, from Camp Cropper, a detainee facility operated by the MNF-I in Iraq, to the custody of the Government of Iraq for possible prosecution for criminal offenses committed in Iraq. In issuing the injunction, the court stated:

> As a legal matter, resolution of the petitioner's motion for a preliminary injunction and his underlying habeas petition centers on whether the petitioner is held in either physical or constructive custody of the respondents [U.S. Secretary of the Army and two U.S. military officers]. The parties dispute whether the MNF-I, the entity that is technically holding the petitioner in its custody, is an entity that is synonymous with, or a part of, the respondents, such that the petitioner is in the respondents' constructive custody. Concluding that the matter presents serious and difficult questions and that the risk of irreparable injury is high, the court rules that the petitioner meets the requirements for a preliminary injunction.

As to jurisdiction, the court noted that the United States argued that the court did not have jurisdiction over MNF-I, which "'operates with the consent of the sovereign government of Iraq to maintain security and stability in Iraq, and receives its authority pursuant to United Nations Security Council resolutions.'"

Excerpts below from the court's opinion provide its analysis in concluding that the preliminary injunction should issue while acknowledging that the jurisdictional issue would be revisited in a later stage of the litigation, stating:

> Viewed in conjunction with the need to avoid "an exaggeratedly refined analysis of the merits at an early stage in the litigation," particularly where the requested

> injunctive relief seeks to maintain the status quo, . . . the possibility that formulaic concepts of habeas may deprive the court of jurisdiction at a later stage of the litigation is not enough for this court to deny the motion for a preliminary injunction. With a view to ensuring that the petitioner does not become a victim of a lack of precedent and because the facts as alleged entitle the petitioner to relief, the court concludes that the jurisdictional issues in the present case do not pose a fatal obstacle at this stage of the litigation.
>
> The court also rejected the U.S. argument that the petition raised a non-justiciable political question because it asked the court to interfere with decisions by U.S. military officers in their dealings with the MNF-I and the Government of Iraq in the handling of a security internee who was alleged to have committed criminal offenses in Iraq. (Most footnotes and citations to submissions in the case are omitted).

---

* * * *

Three important distinguishing factors lead the court to the conclusion that *Hirota* [*v. MacArthur*, 338 U.S. 197 (1948)] is inapplicable in the present situation. First, *Hirota* involved habeas petitions filed by residents and citizens of Japan. *Id.* at 198. Shawqi Omar is an American citizen, and Supreme Court case law after the *Hirota* decision indicates that citizens are entitled to the highest level of protection from detention at the hands of the executive. *Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) (describing an "ascending scale of rights" with "citizenship as the head of jurisdiction"). Indeed, Justice Douglas, in his concurring opinion in *Hirota*, expressed alarm at the potential implications of denying an American citizen access to the habeas writ simply because the citizen stood condemned by a multinational military tribunal. *Hirota*, 338 U.S. at 201-202. Second, the petitioner in this case presents evidence showing that he is in the constructive custody of the respondents. Specifically, the petitioner submits two e-mails from the State Department to the petitioner's

wife, stating that the petitioner is "under U.S. military care, custody and control," and that the petitioner is "under control of Coalition Forces (U.S. and MNF)." These e-mails cast doubt on the respondents' claim that the petitioner has been under MNF-I custody since his original detention. In short, whereas the *Hirota* decision indicates that the Japanese detainees were held by an entity other than the United States, the petitioner here has presented strong evidence that he is in the constructive custody of the United States military.

Third, the *Hirota* case was decided prior to significant evolution of the Supreme Court's habeas jurisprudence. In the time between the *Hirota* decision and the Supreme Court's most recent habeas decisions, the Supreme Court has expanded and clarified the application of the "Great Writ" to better fulfill its ultimate purpose of allowing an individual to present "a simple challenge to physical custody imposed by the Executive." *Padilla*, 542 U.S. at 441 (discussing the historical development of habeas jurisprudence). For example, in 1953, the Court expanded jurisdiction over habeas cases to include petitions brought by individuals convicted in military tribunals who alleged that their court martials denied them of basic rights. *Burns v. Wilson*, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953); 95 A.L.R. Fed. 472 § 2(a) (discussing the importance of *Burns v. Wilson*). In the concurring opinion, Justice Frankfurter explained that "the right to invoke habeas corpus to secure freedom is not to be confined by any a priori or technical notions of 'jurisdiction.'" *Id.* at 148 (Frankfurter, J., concurring). By 1973, the majority of the Supreme Court, embracing the sentiments first expressed by Justice Frankfurter twenty years earlier, "rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements," and expanded the relief addressable by the writ to include restraints other than physical confinement. *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 350, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973).

The Supreme Court has recently further clarified the scope of the traditional habeas to respond to new situations, illuminating this court's present path. *See, e.g., Rasul*, 542 U.S. at 483 (extending

the reach of habeas to nonresident aliens detained in Guantanamo Bay, Cuba and reasoning that "as Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" (citing *King v. Crowle*, 2 Burr. 834, 854-55, 97 Eng. Rep. 587, 598-99 (K.B.)). The Court's expansions and clarifications of habeas have served the ultimate purpose of preserving the writ's status as the "stable bulwark of our liberties." *Hamdi v. Rumsfeld*, 542 U.S. 507, 557, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (Scalia, J., dissenting) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *153). *Hirota* is therefore distinguishable from the case at bar in a fashion rendering it inapplicable to the present situation.[11]

* * * *

The petitioner alleges that the respondents, through a multinational military force comprised largely of American troops and commanded by American officials, are holding him in violation of his due process [rights]. These facts alone allow the court to entertain the petitioner's habeas petition. *Hirota*, 338 U.S. at 204 (Douglas, J., concurring) (explaining that the writ of habeas corpus runs not to an official of an international coalition, but to the American officials in such a coalition). As Justice Douglas stated:

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the

[11] In addition to *Hirota*, the respondents cite a few other cases for the well-established proposition that United States courts cannot review decisions taken by the tribunals of other sovereign nations. . . . In contrast to the cases cited by the respondents, the petitioner here has not been convicted by a foreign tribunal and is not contesting a decision taken by another sovereign nation. The petitioner here alleges that United States officials, through a multinational military force made up mostly of American troops, holds him in violation of American laws. The petitioner, in other words, is not challenging a decision taken by another sovereign nation; he merely challenges the role that American officials, through a multinational force, have in his detention. Where a habeas petitioner challenges actions taken allegedly at the behest of the United States, the court engages in a constructive custody analysis. *See, e.g., Abu-Ali*, 350 F. Supp. 2d, 28 47 (D.D.C. 2004). . . .

> Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

Id. . . .

* * * *

On April 14, 2006, the United States filed a timely notice of appeal from the preliminary injunction. Excerpts follow from the statement of facts and summary of the U.S. argument in its Brief for Appellants, filed June 2, 2006. (Footnotes and citations to the Joint Appendix have been omitted). The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm.*

---

* * * *

STATEMENT OF THE FACTS

A. The Multinational Force–Iraq and the Government of Iraq

This appeal [of the preliminary injunction] and the district court's habeas jurisdiction both concern the status of the United States armed forces currently operating in Iraq. The United States conducts military operations in Iraq as part of a multinational force—MNF-I—that operates in accordance with United Nations Security Council Resolutions 1546 (2004) and 1637 (2005). The MNF-I consists of contingents from approximately 27 nations, including the United States. While the United States is the leading participant in the MNF-I, that international entity is legally distinct from the United States and its armed forces, and operates in accordance with the mandate of United Nations Security Council Resolutions issued at the request of the sovereign Government of Iraq.

In particular, U.N. Security Council Resolution 1546 provides, in part, that "the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism * * *." As the letters annexed to Resolution 1546 make clear, the MNF-I is charged, *inter alia*, with engaging in combat operations against members of groups posing security threats to Iraq, and internment of such individuals where necessary for imperative reasons of security. In addition, at the request of the Government of Iraq, MNF-I forces maintain physical custody of detainees facing criminal investigation and prosecution in the Iraqi court system.

In November 2005, the Security Council reaffirmed and extended Resolution 1546 by issuing Resolution 1637. At that time, the Security Council made clear that "the presence of the multinational force in Iraq is at the request of the Government of Iraq." The mandate of that force was extended until December 31, 2006.

* * * *

C. The MNF-I Tribunal and the Central Criminal Court of Iraq

Following his capture, in December of 2004, Omar appeared before a three-member panel of the MNF-I, consistent with the principles of Article V of the Geneva Convention, to determine his status as a combatant. . . .

. . . The panel concluded that Omar: (1) did not satisfy the criteria for prisoner of war status under the Third Geneva Convention; (2) met the criteria for status as a security internee under the law of war; and (3) met the definition of an "enemy combatant" in the war on terrorism.

Subsequently, in August 2005, the MNF-I determined that Omar's case would be appropriately handled in the Central Criminal Court of Iraq (CCCI). This determination was made, *inter alia*, based on security considerations and as part of ongoing efforts to cooperate and coordinate with the civilian authorities in Iraq to facilitate the Government of Iraq's ability to prosecute

crimes committed within the sovereign territory of Iraq. This Iraqi civilian court is a national court of the Government of Iraq, and operates under Iraqi law. . . .

* * * *

Omar is currently in MNF-I custody, awaiting his appearance before the Iraqi criminal court for an investigative hearing. For the benefit of the Iraqi court, the MNF-I maintains physical custody of detainees for the duration of all court proceedings. Detainees are transferred from MNF-I custody to the physical custody of Iraqi authorities if there is a conviction and sentence. Such action is typical for foreign fighters captured in Iraq by the MNF-I for which credible evidence of criminal activities exists.

* * * *

SUMMARY OF ARGUMENT

* * * *

A. The district court lacked jurisdiction over this case under *Hirota v. General of the Army MacArthur*, 338 U.S. 197 (1948). In *Hirota*, the Supreme Court held, because the petitioners' sentences had been imposed by an international tribunal, there was no habeas jurisdiction over a petition filed by Japanese prisoners held by (and some of whom were about to be executed by) United States military officers under a direct chain of command from the United States. The Court adhered to this view despite the facts that the international tribunal had been established by General Douglas MacArthur in his role as Supreme Commander of the Allied Powers, General MacArthur had denied petitioners' appeals from that tribunal, and General MacArthur reported to the President of the United States and the Joint Chiefs of Staff.

Here, the relationship between the United States and Omar's custody is directly analogous to that in *Hirota*. Omar is being held by United States military officers, but they are acting as part of an international body—the MNF-I—which derives authority from United Nations Security Council resolutions issued at the request of the sovereign Government of Iraq. In addition, that multinational force seeks to facilitate the investigation and prosecution of

Omar by the sovereign Government of Iraq. Accordingly, *Hirota* dictates that the district court lacked jurisdiction here.

The district court declined to apply *Hirota* because Omar is a U.S. citizen, while the *Hirota* petitioners were aliens. But the majority opinion in *Hirota*, as well as Justice Douglas' concurrence, makes clear that the international identity and composition of the military tribunal pursuant to which petitioners were being held, and not the citizenship of the petitioners, was the key to the Court's jurisdictional ruling. Similarly here, the international identity and composition of the multinational force pursuant to which Omar is being held in Iraq divests U.S. courts of habeas jurisdiction to review the custodial decisions of that force, regardless of the citizenship of the detainee.

The district court also believed that the Supreme Court's reasoning in *Hirota* has been overtaken by other cases, and declared that *Hirota* is no longer controlling precedent. But the Supreme Court's and this Court's decisions emphatically establish that only the Supreme Court can decide that its precedents are no longer governing. The district court was not free to make that determination. Thus, *Hirota* continues to apply, and it dictates that the district court's unprecedented injunction be reversed and that Omar's habeas petition be dismissed.

B. The district court's injunction suffers from another, perhaps even more fundamental, jurisdictional defect. The injunction, as well as the habeas petition itself, raises non-justiciable political questions implicating highly sensitive warmaking, national security, and foreign relations functions that are constitutionally vested in the Executive and are not appropriate subjects for judicial review. Omar was captured by military personnel in an active zone of combat in Iraq, while harboring foreign and domestic fighters who were planning both direct participation in the Iraqi insurgency and the kidnappings of foreigners to finance that insurgency. Until his capture, Omar presented a serious risk to the multinational military forces, including United States military personnel, and to civilians in Iraq.

The proper handling of such a captured enemy combatant—*e.g.*, whether to keep him in military custody, convene a military tribunal, or refer him to domestic authorities for prosecution—is

a question fraught with military and diplomatic significance and is committed to the military forces in Iraq, and is not subject to second-guessing by a habeas court outside of the combat zone, half-way around the world. Indeed, such quintessential military decisions have for centuries been made by the commanders in the field without judicial oversight or interference at home.

The handling of Omar also implicates the relations between the United States, the 27 other nations participating in the MNF-I, and, equally important, Iraq itself. The United Nations Security Council granted authority to the MNF-I and charged it with, *inter alia*, the vital mission of maintaining security and stability in Iraq, including by preventing and deterring terrorism, and assisting in the rebuilding of Iraqi institutions. Because of his significant role in the insurgency, surrendering Omar for prosecution has an important bearing on the security of troops from all of the countries participating in MNF-I. And Iraq itself has a strong interest in being able to investigate and prosecute those who allegedly commit crimes within its borders. Decisions concerning the circumstances in which it is feasible and appropriate to support the Iraqi Government, the United Nations, and the other participants in MNF-I, by facilitating the investigation and prosecution of Omar by the Iraqi judicial system, are inherently political decisions ultimately grounded in the military and foreign relations interests of the United States.

Furthermore, the federal courts—under the "Rule of Non-Inquiry"—have for decades held that they have no legitimate role in judging foreign judicial systems and thereby overriding decisions by the Executive Branch to surrender individuals, including citizens, to foreign countries for criminal proceedings. As the Supreme Court observed more than a century ago in rejecting a habeas petition filed by a citizen who sought to avoid facing trial for offenses committed in military-occupied Cuba in the wake of the Spanish-American War, "[w]hen an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and punishment as the laws of that country may proscribe for its own people." *Neely v. Henkel*, 180 U.S. 109, 123 (1900). Courts have thus long refused to engage in the type of review sought by Omar here to avoid investigation and prosecution before the Iraqi criminal court for offenses committed in Iraq.

Of course, Executive Branch officials would not turn Omar over to the Iraqi judicial system if they believed that Omar would likely be tortured in that system. But the Rule of Non-Inquiry and other separation of powers principles make clear that the decision about whether Omar can legally be surrendered to the Iraqi court is committed to the Executive Branch, which takes into account a variety of considerations that cannot properly be weighed by the courts. The wartime context in which Omar's overseas detention arises only underscores that decisions concerning the proper handling of Omar are for the Executive, and not the courts.

C. In addition to the other jurisdictional defects, the entire premise of the district court's injunction is fundamentally flawed and inconsistent with Article III of the Constitution. The district court imposed the injunction to ensure that Omar's habeas action did not become "prematurely moot" by his release from U.S. military custody and placement into the custody of Iraqi authorities following a potential conviction and sentence by the Iraqi court. But even under the legal theory proposed by petitioners, those "prematurely mooting" events would grant Omar all of the relief to which he is entitled through a writ of habeas corpus, namely release from detention by the United States or MNF-I. Article III of the Constitution does not permit a court to preserve artificially a "case or controversy" by enjoining a party from providing the very relief sought in an action. Indeed, the anomaly that the habeas petition here resists—and, in fact, identifies irreparable harm in—the very relief that a habeas petition traditionally seeks [—] only underscores the correctness of *Hirota* and the applicability of the political question doctrine. Habeas provides a mechanism to test the legality of executive detention, not a means to test the validity of multinational detention, let alone a means to preserve that detention or prevent cooperation between a multinational force and the civilian authorities of Iraq. It is improper for Omar to seek to use the habeas process to shield himself from prosecution by a foreign sovereign, especially when he freely chose to live within its territory, and it was similarly improper for the district court to issue an injunction that effectively prevents the Government of Iraq from prosecuting Omar for crimes committed on sovereign Iraqi territory.

* * * *

(ii) Mohammed v. Harvey

In *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), the petition for habeas and a temporary restraining order against transfer to the Iraqi government was brought on behalf of Mohammed Munaf by his sister Maisoon Mohammed. Munaf, a dual U.S.-Iraqi citizen, had entered Iraq with a group of Romanian journalists, all of whom were kidnapped by a group claiming to be the "Muadh Ibn Jabal Brigade" and freed in a raid by MNF-I. The Government of Iraq subsequently charged Munaf with criminal involvement in the kidnapping; he was convicted by an Iraqi court and sentenced to death. As the U.S. district court explained:

> . . . Under [its] limited mandate, which is set to expire at the end of 2006 unless renewed, MNF-I operates "on behalf of and at the request of the Iraqi government" in Iraq. MNF-I's power under the U.N. Resolutions includes the authority to detain prisoners who pose a threat to security in Iraq. MNF-I and the government of Iraq have agreed that MNF-I will maintain physical custody of prisoners awaiting criminal prosecution in Iraqi courts, as Iraq lacks much of the infrastructure necessary for maintaining its own prisoners. . . .
>
> Since the MNF-I raid, petitioner Munaf has been held as a prisoner by MNF-I troops at Camp Cropper, a military installation located at the Baghdad International Airport. It has been alleged that petitioner was a willing participant in a kidnapping-for-profit scheme, in that he posed as a kidnap victim and led the actual victims into a trap. Petitioner maintains he is innocent of any criminal wrongdoing, and that he is not and has never been a member of al Qaeda in Iraq or any other terrorist group.

The court reviewed evidence submitted including allegations concerning the involvement of U.S. military personnel in his detention and in the Iraqi trial. Excerpts below provide the court's reasoning in concluding that "[b]ecause petitioner is in the custody of a multinational entity and not the

United States, he cannot invoke this Court's jurisdiction." (Most footnotes and citations to submissions in the case are omitted).

Munaf appealed to the D.C. Circuit Court of Appeals, which issued an order temporarily enjoining Munaf's transfer to Iraqi custody pending consideration of his appeal by the circuit court. The appeal was pending at the end of 2006.

---

* * * *

. . . [Under the federal habeas corpus statute, 28 U.S.C. § 2241] a court has jurisdiction to issue the writ [of habeas corpus] only if the petitioner is "in custody under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," or other elements not relevant here. A central prerequisite for habeas relief is that the court must have the ability to force compliance by the petitioner's custodian, because "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). . . .

* * * *

. . . [P]etitioner fails on a threshold requirement: he is not being held "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," as required under the habeas statute. Petitioner has alleged that he is "detained by U.S. officials" and "in U.S. custody." But he is in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly, not from the United States acting alone. The United States has not asserted and does not profess to have the independent right to order that petitioner be moved, tried, punished, or released. Petitioner is thus under the actual, physical custody of MNF-I, a multinational entity separate and distinct from the United States or its army. He is in the constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him, and which controls his ultimate disposition. Petitioner thus has two custodians, one

actual and the other constructive: MNF-I and the government of Iraq. Petitioner has not shown that either custodian is the equivalent of the United States for the purposes of habeas corpus jurisdiction.

1. Iraq as Custodian

Petitioner voluntarily entered the sovereign country of Iraq and has been convicted by the courts of that country for a violation of Iraqi law. The writ of habeas corpus will not reach to a foreign sovereign. *See, e.g., Duchow v. United States*, 1995 U.S. Dist. LEXIS 10261, 1995 WL 425037 *1, *3, 95-cv-2121 (E.D. La. 1995) (U.S. citizen detained in Bolivia by Bolivian government not entitled to habeas relief). *See generally Ex parte Mwenya*, [1960] 1 Q.B. 241 (summarizing evolution of British common law of habeas corpus, in which availability of the writ turns on the sovereign's control over the custodian). In exceptional cases where the United States acts through another country as an intermediary to hold a U.S. citizen, at the direction and under the ultimate control of the United States, the writ can be issued to the appropriate officials of the United States. *Abu Ali*, 350 F.Supp. 2d 28. But no evidence has been presented that the sovereign nation of Iraq is holding petitioner at the direction and under the ultimate control of the United States.

2. MNF-I as Custodian

It does not change the outcome to point out that Munaf is in the physical custody of U.S. troops in their capacity as participants in MNF-I. Where a U.S. citizen is detained under the authority of a multinational military entity, he is not in custody "under or by color of the authority of the United States," even if American military personnel play a role in his detention as part of their participation in that multinational force. Petitioner in this case is held by MNF-I, operating under international authority derived from the U.N. Resolutions. MNF-I has clearly asserted its authority over him by, for instance, conducting a hearing at which MNF-I determined that petitioner should be held as a security internee and that his case should be referred to [the Central Criminal Court of Iraq ("CCCI")].

In *Hirota v. General of the Army MacArthur*, 338 U.S. 197, 69 S. Ct. 197, 93 L. Ed. 1902 (1948) (per curiam), Japanese citizens

moved in the Supreme Court for leave to file habeas corpus petitions challenging their sentences under a military tribunal in Japan. American military personnel participated in the tribunal, and the prisoners were in the physical custody of U.S. troops. General Douglas MacArthur, acting in his capacity as Supreme Commander for the Allied Powers, established the military tribunal "as the agent of the Allied Powers." *Id.* at 198. The Court denied the petitioners' motion because "the tribunal sentencing these petitioners is not a tribunal of the United States." *Id.* The Court traced the authority under which the tribunal acted and determined that it emanated from the multinational Allies and not the United States in its independent capacity. Because the prisoners were held under the authority of an entity that was "not a tribunal of the United States," the prisoners were not in the custody of the United States for purposes of habeas jurisdiction.

The rule recognized in *Hirota* was applied in *Flick v. Johnson*, 85 U.S. App. D.C. 70, 174 F.2d 983 (D.C. Cir. 1949), in which German citizens petitioned for habeas corpus to challenge their convictions by an Allied military tribunal in Germany following World War II. . . . Because the tribunal derived its authority from the Allies acting jointly in the immediate aftermath of the fall of Germany, it was not "a tribunal of the United States." Therefore "no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed." *Id.* at 984.

Petitioner counters that the habeas applicants in those cases were not U.S. citizens. But nothing in *Hirota* or *Flick* purported to turn on whether the petitioners were citizens. The courts were without jurisdiction because the petitioners were held under the authority of entities that were "not a tribunal of the United States." The identity of the custodian, and the concomitant lack of habeas jurisdiction, would remain the same regardless of the petitioners' citizenship. This is because, as stated previously, the writ acts upon the custodian, not the prisoner.

The fact that it is the identity of the custodian that matters most in this context, and not the citizenship of the prisoner, is demonstrated by *In re Yamashita*, 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946). There a Japanese commander petitioned for habeas corpus to challenge his sentence by a military tribunal in the Philippines.

The Supreme Court traced the authority under which the tribunal was established: the authority emanated originally from the President of the United States as commander-in-chief, who directed the Joint Chiefs of Staff, who in turn commanded General MacArthur, acting in his capacity as "Commander in Chief, United States Arm[ed] Forces, Pacific," who in turn specifically ordered a U.S. Army general to establish the tribunal. *Id*. at 10. The tribunal derived its power entirely from the United States Executive and operated outside the framework of the Allied Powers. The Court found that there was habeas jurisdiction for a limited inquiry into the jurisdiction of the sentencing tribunal.

Hirota and *Yamashita*, taken together, recognized that General MacArthur acted in two capacities, as both an American and Allied commander, and evaluated the derivation of authority by which he and his subordinates held prisoners in custody. Therefore, prisoners who were in custody of the United States alone, under the sole authority of the United States, could invoke habeas jurisdiction. But prisoners who were held pursuant to the authority of the Allies, and who were in the physical custody of American soldiers acting as members of the Allied Powers, were in the custody of the Allies, not the United States, and therefore could not invoke the jurisdiction of the U.S. courts. *Flick* and *Madsen v. Kinsella*, 343 U.S. 341, 72 S. Ct. 699, 96 L. Ed. 988 (1952) are to the same effect for the European theater.

Petitioner claims that citizenship must have mattered in *Hirota* and *Flick* because there have been other cases where courts entertained habeas applications from citizens who were in the custody of the United States while it participated in a multinational force. But in each of these cases, the petitioner was held under the independent authority of the United States *qua* United States, not by a multinational force in which the United States participated. In all of those cases, the courts traced the authority of the custodian to its source to determine if the custodian was the United States or some other entity.

* * * *

Petitioner has argued that strong dicta in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), counsels a

different result. After denying enemy aliens held abroad the right to sue in U.S. courts, the Supreme Court distinguished the rights of aliens from those of citizens, and opined that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Id*. at 769. But in the very same paragraph, the Court identified two ways in which the courts protect citizenship: by issuing writs of habeas corpus to those in custody by the United States, and by hearing suits to declare a person a citizen "regardless of whether he is within the United States or abroad." *Id*. at 769-70. But the Court followed by noting that "[w]hen any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful to use means not amounting to acts of war to effectuate his release." *Id*. at 770. The *Eisentrager* Court thus recognized that while citizenship may be a head of jurisdiction, it does not justify jurisdiction when the citizen is not held by the United States; the only remedies there are diplomatic, not judicial.

Most tellingly, *Eisentrager* recognized the distinction between custody by the authority of the United States and custody by the authority of a multinational entity. As the first matter it considered, the Court found that the petitioners were in the custody of a United States force that derived its authority solely from the United States, and that the "proceeding was conducted wholly under American auspices and involved no international participation." *Id*. at 765. *Eisentrager* thus recognizes the threshold importance of determining the identity of the custodian.

Recent developments in the law of habeas corpus serve to confirm the holding in the instant case. *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004), *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), and *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 165 L. Ed. 2d 723 (2006), reiterate that the remedy provided by the writ of habeas corpus is expansive and not confined solely to U.S. citizens. But the one constant in all these cases is that the petitioners were in the custody of the United States alone, in its capacity as the United States, and

not by any multinational force. While the prisoners may have been *captured* by a multinational force, they were transferred to the sole custody of the United States, and it was that detention they challenged. There is not even the slightest hint in any of these cases that another nation or multinational entity claimed control over the prisoners.

This is not to say that the United States military may purposefully evade the habeas jurisdiction of the courts, or otherwise deprive citizens of their rights, merely by cloaking its conduct in the guise of a multinational force. Nothing in today's holding is inconsistent with *Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28 (D.D.C. 2004), which held that "the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen." *Id*. at 41.

* * * *

The court in *Abu Ali* noted that "[t]he instances where the United States is correctly deemed to be operating through a foreign ally as an intermediary for purposes of habeas jurisdiction will be exceptional, and a federal court's inquiry in such cases will be substantially circumscribed by the separation of powers." *Id*. at 41. . . . The importance of recognizing the "considerable limitations" on a court's "substantially circumscribed" inquiry is especially apparent in this case, where the Executive acts not only under its foreign affairs powers, by dealing with dozens of allies and the United Nations, but also under its war powers.

* * * *

. . . Petitioner has not alleged the kind of jurisdictional facts that would qualify this case as one of the "exceptional" instances where the United States is acting through an intermediary to detain a citizen.[12] Given the paucity of allegations that petitioner is in the custody of the United States and not MNF-I, and the necessarily "substantially circumscribed" nature of the Court's inquiry, jurisdictional discovery is not warranted.

---

[12] This puts the Court at odds with the ruling in *Omar v. Harvey*, 416 F.Supp. 2d 19 (D.D.C. Feb. 13, 2006), whereby Judge Urbina issued injunctive relief to bar the transfer of an American citizen from MNF-I to

Finally, *Eisentrager* and *Rasul* strongly suggest that there are constitutional aspects to the right to habeas corpus, whether or not they are embodied in the jurisdictional statute. To the extent that there remain constitutional aspects of the right which have not been covered by recent Supreme Court decisions, this does not change the outcome of this case. The right to habeas corpus embodied in the statute reflects the fundamental nature of the writ as captured in the Constitution and as it has survived for centuries in the common law. It is a right against the sovereign.

Courts have struggled to describe the scope of the right by reference to territorial bounds, citizenship, and the malleable meaning of custody itself. . . . But at least one thing is constant about the right: it applies only against the sovereign that grants it. The petitioner here is challenging his detention on foreign soil, under the authority of a multinational force, at the request of a foreign government. "[P]rovisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws" and the like "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country," because there the citizen is treating with a foreign country, and our Constitution gives him rights only as against the United States. *Neely v. Henkel*, 180 U.S. 109, 122, 21 S. Ct. 302, 45 L. Ed. 448 (1901). The same holds true of a duly constituted allied force, against which petitioner does not have constitutional rights.

Iraqi authorities. . . . The Court respectfully disagrees that the casual representations of a State Department employee provide a sufficient basis for what amounts to piercing the veil between the United States and an entity comprised of the United States acting jointly with its allies. . . . The government has been careless in its language, which sometimes reflects the reality that it is mostly U.S. troops who are carrying out the mission of MNF-I, and thus it is usually U.S. troops who are doing the physical "holding" of the petitioner. But it takes more than some offhand remarks by a few government officials to change the nature of a multinational force that has been created by the governments of over two dozen sovereign nations. Much more is required to establish habeas jurisdiction in the face of Supreme Court precedent respecting the distinction between the United States when it acts alone and when it acts as part of an allied force, as well as the "substantially circumscribed" nature of the Court's inquiry under *Abu Ali*.

Whatever independent effect the habeas provision of the Constitution may have, it does not grant petitioner the right to secure the writ against one who does not hold him in custody "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States." The habeas provision of the Constitution therefore cannot expand the jurisdiction of the Court in this case beyond that granted by the statute.

* * * *

(2) Freedom of Information Act Cases

(i) American Civil Liberties Union v. Department of Defense

In September 2005 the U.S. District Court for the Southern District of New York issued a decision that, among other things, ordered the release of certain photographs and videotapes depicting abuse of detainees at Abu Ghraib prison in Iraq ("Darby photos") in response to a request by the American Civil Liberties Union and others pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552-552b ("FOIA"). *American Civil Liberties Union v. Department of Defense*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005). *See Digest 2005* at 1020-29. The United States appealed; the litigation was settled after virtually all of the Darby photos were published on the internet by a third party.

In April 2006 the district court established a procedure for resolving whether certain other photographs at issue, depicting the treatment of detainees in Iraq and Afghanistan ("Army Photos"), had been properly withheld under FOIA exemptions 6, 7(C) and 7(F). In June 2006 the court issued two more orders, dated June 9, 2006 (2006 WL 1638025 (S.D.N.Y. 2006)) and June 21, 2006 (2006 U.S. Dist. LEXIS 40894 (S.D.N.Y. 2006) ordering the release of twenty-one Army Photos, relying on its holdings set out in the September 2005 decision. The United States appealed. Excerpts below from the U.S. brief to the U.S. Court of Appeals for the Second Circuit provide a summary of the U.S. argument on appeal,

with further excerpts from the U.S. argument that release of the photographs would violate U.S. obligations under the Geneva Conventions. The declaration of Edward R. Cummings, referred to below, is excerpted in *Digest 2005* at 1026-29. (Most footnotes and citations to submissions in the case are omitted from the excerpts that follow). The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

SUMMARY OF THE ARGUMENT

The district court erred in ordering the release of images depicting Iraqi and Afghani detainees gathered during investigations into detainee mistreatment. These photos fall within the protection of FOIA Exemption 7(F) because their release "could reasonably be expected to endanger the life or physical safety of any individual," including U.S. troops, Coalition forces and civilians in Iraq and Afghanistan. *See* Section B, *infra*. In the expert judgment of Brigadier General Ham and General Myers, release of such images can reasonably be expected to incite violence. These predictive judgments on issues of national security, backed by the hard experience of deadly violence resulting from the incorrect *Newsweek* story concerning alleged abuse of the Koran and publication of a cartoon of the Prophet Muhammad, are entitled to substantial deference. The district court properly acknowledged the significant danger that would accompany release of these photos. Nonetheless, the court remarkably determined that it could weigh the potential loss of life against the value of fostering "education and debate" over widely known detainee abuses. Such balancing is wholly inappropriate. Congress has provided—in no uncertain terms—that Exemption 7(F) applies once a threat to life or safety is discerned. The district court had no basis either for disregarding the predictive judgments of harm by Brigadier General Ham and General Myers, or for conducting its own dubious balancing test, placing "education and debate" over a "threat to [the lives] and safety of our soldiers."

In addition, Exemptions 6 and 7(C) independently justify Defendants' decision not to release photos of the detainees, many of whom are depicted in degrading or humiliating circumstances. . . . Congress and the courts have recognized the substantial privacy interest crime victims have in avoiding widespread public access to evidence depicting their suffering. The Third and Fourth Geneva Conventions, which prohibit the exposure of detainees to "public curiosity," recognize similar privacy interests.

The district court erred in concluding that redacting identifying features from the photos eliminated any cognizable privacy interest. The privacy interests protected by Exemptions 6 and 7(C) go beyond the mere identification of the person involved. Redacting identifying information does not change the fact that the individual detainees will recognize themselves and thus will witness their personal humiliation being displayed repeatedly throughout the world. Moreover, there is a risk that such individuals might be identified given the release of the investigative reports associated with these photographs.

In addition, while there is public interest in the issue of detainee mistreatment, all of the underlying investigative reports associated with these photographs have been released to the public, thus satisfying FOIA's mandate to inform the public of the operations or activities of the Government. Release of the Army Photos would not significantly advance the public's understanding of the activities of Government beyond the information contained in the already released investigative reports. Accordingly, any arguable value served by release is outweighed by the detainees' privacy interests under Exemptions 6 and 7(C).

* * * *

2. Release of the Army Photos Would Constitute a Significant Invasion of the Privacy of the Detainees Depicted in the Photos

The privacy interest recognized by FOIA is "at its apex" for documents discussing or depicting "a private citizen." *Reporters Committee*, 489 U.S. at 780. As the Supreme Court has made clear, moreover, Exemptions 6 and 7(C) protect more than a "cramped notion of personal privacy." [*Id.*] at 763. Indeed, the privacy interests

protected by FOIA are more expansive than those protected by tort law or the Constitution. *Id.* at 762 n. 13. . . .

* * * *

. . . In this case, the Geneva Conventions further confirm that there is a substantial privacy interest against being publicly depicted in humiliating circumstances.*

Article 13 of the Third Geneva Convention requires a detaining power to protect any prisoner of war within its custody, "particularly against acts of violence or intimidation and against insults and public curiosity." The Fourth Geneva Convention, which protects certain civilian detainees, contains a similar requirement. Article 27 of that Convention states that covered detainees "are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

Three government officials submitted declarations in the district court setting forth the United States' official interpretation of these provisions: Richard B. Jackson, Chief of the Law of War

* *See* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("the Fourth Geneva Convention"). The United States is a party to both Conventions. In this case, individuals in Iraq depicted in the photographs were entitled at the time the photographs were taken to protection under the Third and Fourth Geneva Conventions. With regard to those detainee photos, FOIA should be interpreted consistent with the Geneva Conventions, if at all possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804). Although the President determined on February 7, 2002, that members of Al Qaeda and the Taliban do not qualify as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War, the President also determined that U.S. armed forces will treat detainees "in a manner consistent with the principles of Geneva" to the extent appropriate and consistent with military necessity. *See http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.*

18-Cummins-Chap18.indd 1216 10/22/07 11:50:31 PM

Branch for the Office of the Judge Advocate General of the United States Army; Geoffrey Corn, the prior Chief of the Law of War Branch; and Edward Cummings, a State Department Assistant Legal Advisor who has had official responsibility for interpreting the Geneva Conventions for more than 25 years. As these officials make clear, the United States has historically interpreted the Conventions to prohibit the release of photographs depicting detainees in humiliating or degrading circumstances.**

Thus, the United States has consistently protested the display of American prisoners on television. In January 1991, for instance, President Bush decried the "brutal parading" of Allied pilots by the previous Iraqi regime, calling it a "direct violation of every convention that protects prisoners." And in 2003, after several photographs were published depicting the processing of incoming detainees at Guantanamo Bay, DOD issued specific guidelines to ensure compliance with its "policy of limiting photography [ ] in accord with treating detainees consistent with the protections provided under the Third Geneva Convention."

Indeed, this interpretation is consistent with military regulations. For instance, Army Regulation 190-8, paragraph 1-5d, provides that "[p]hotographing, filming, and video taping" of individual detainees "for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited." That provision expressly implements the Geneva Conventions.

For similar reasons, the mere lack of identifying information does not eliminate the obligation to respect the dignity of detainees or to avoid exposing them to "public curiosity." By the district court's logic, the Geneva Conventions would permit the public viewing of enemy prisoners being subjected to mistreatment

** The interpretation of an international treaty by the Executive Branch is entitled to "great weight" from the courts. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). This is particularly true where, as here, the interpretation "follows from the clear treaty language," in which case the court "must, absent extraordinarily strong evidence, defer to that interpretation." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). In this case, the Executive's interpretation of the Geneva Conventions easily qualifies for deference.

through the streets, as long as the prisoners wore hoods to hide their identity. However, the Geneva Conventions protect against the release of humiliating images regardless of whether an individual detainee can be identified.

In sum, under both legal precedent in the FOIA context and the United States' historical interpretation of the Geneva Conventions, the privacy interests at stake here outweigh the public's interest in disclosure. Accordingly, the Government properly withheld the photographs in their entirety under Exemptions 6 and 7(C).

* * * *

(ii) Associated Press v. Department of Defense

In January 2006 the U.S. District Court for the Southern District of New York issued an opinion finding no basis for the Department of Defense ("DOD") to redact certain personal information from transcripts of tribunals at Guantanamo previously provided in response to a FOIA request by the Associated Press ("AP"), and ordered DOD to provide unredacted transcripts. *Associated Press v. Department of Defense*, 410 F. Supp. 2d 147 (S.D.N.Y. 2006) (referred to in later cases discussed below as "*AP I*"); *see also Digest 2005* at 1018-20.

On September 20, 2006, the district court ordered the U.S. Department of Defense to produce documents requested pursuant to a FOIA request by the Associated Press related to detainees in Guantanamo, including documents relating to detainee mistreatment by DOD personnel, detainee-against-detainee abuse, decisions to release or transfer detainees, and certain documents relating to hearings of the Administrative Review Boards ("ARBs"). 2006 U.S. Dist. LEXIS 67913 (S.D.N.Y. 2006). Following production of approximately 1400 pages of documents by DOD, with redactions, the parties had "narrowed their dispute, so that only four categories of redaction" were in issue before the court. Excerpts below address the court's conclusion that redactions in only one document were covered by the exemptions to the FOIA.

---

* * * *

(d) . . . Finally, DOD has redacted, purportedly pursuant to FOIA Exemptions 3 and 6, 5 U.S.C. § 552(b)(3) and (b)(6), information identifying family members of two detainees from correspondence sent by those family members to the detainees and then submitted by the detainees to their ARBs as part of the ARB proceedings.

* * * *

Following DOD's production to AP on March 3, 2006, pursuant to this Court's Order in *AP I*, of the Combatant Status Review Tribunal documents, which production included personal correspondence transmitted between detainees and their family members by the International Committee of the Red Cross ("ICRC"), known as "Red Cross Messages," the ICRC formally requested that DOD refrain from publicly releasing such documents in the future. Subsequently, Deputy Secretary of Defense Gordon England made a determination that the Red Cross Messages that DOD withheld from production in this case satisfy all the criteria of 10 U.S.C. § 130c. It is on this basis that the Government now argues that this final category of redactions is warranted under Exemption 3.

It is true that an agency's invocation of Exemption 3 may, under certain circumstances, compel a more deferential review, *see Aronson v. IRS*, 973 F.2d 962, 965 (1st Cir. 1992). . . . However, even under the more deferential standard, DOD's determination cannot be justified, for the documents simply do not "arguably" or "logically" fall within the scope of § 130c. . . . The language of that section, which exempts from production information "provided by, otherwise made available by, or produced in cooperation with" the ICRC, 10 U.S.C. § 130c(b)(1), was plainly intended to protect sensitive information provided by a foreign government or international organization to the U.S. Government, the disclosure of which would harm interests of the foreign government or international organization. Here, by contrast, the Red Cross delivered these documents directly to the detainees (after allowing DOD a review to ensure that classified or other inappropriate information is not transmitted), and it was the detainees—not the Red Cross—who provided them to the Government (and thereby made them

subject to a FOIA request). . . . Furthermore, the ICRC is only vicariously invoking the detainees' interests, and not its own organizational interest in confidentially communicating with the U.S. Government (which would be the sort of interest the statute protects). Under these circumstances, Section 130c simply does not apply, and therefore neither does Exemption 3.

Exemption 6, however, is a closer call. That Exemption requires the Court to "balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny," *United States Dep't of State v. Ray*, 502 U.S. 164, 175, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991) (internal quotations omitted), compelling disclosure of the correspondence unless doing so "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). The Court previously determined in *AP I* that, as a general matter, "third parties had even less of an expectation [than the detainees] that the information disclosed by the detainees during the tribunal proceedings would be kept confidential". . . . However, the Court invited DOD "to make a particularized showing that one or more specific detainees had retained a reasonable expectation of privacy with respect to one or more specific items of their identifying information sufficient to cause the Court to undertake a balancing of interests as to those particular items.". . . Although in *AP I* DOD expressly declined to submit such specifics when invited to do so by the Court, in the instant situation DOD has presented the Court with somewhat more particularized evidence as to the situation of the family members here in issue.

* * * *

As to the second detainee here in issue ("Detainee b(2)"), . . . the Court concludes, with some hesitation, that DOD has met its burden. Detainee b(2) stated during his ARB, in reference to the Taliban, that "[t]hese are the people who have destroyed Afghanistan, so I despise[] these people." He was also reluctant to share a letter from his wife, telling the tribunal that "It is a big shame in our culture to read my wife's letter for you, but now I am in a very tough situation with the letter from my wife. Do you want it as evidence?" Given all the special circumstances, the Court

concludes that the wife had a reasonable expectation of privacy that was not wholly eliminated by her husband's reluctant offer of the letter to the ARB and that the competing interest of the AP in obtaining her identity is modest. The Court concludes, in this one instance, that the Government has met its burden for redacting the wife's identifying information.

This one instance aside, AP's motion for summary judgment is hereby granted, and DOD's counter-motion denied, in all other respects. Accordingly, all redactions from all materials here in issue, save the one involving the wife of detainee b(2), must be removed, and the unredacted documents must be furnished to AP within one week of the date hereof.

On November 28, 2006, the Southern District of New York addressed certain remaining issues related to AP's FOIA request. 462 F. Supp. 2d 573 (S.D.N.Y. 2006). As explained by the court:

> . . . The immediate dispute . . . raises, for the first time, issues of national security. Pursuant to prior orders of the Court and to consensual agreements between the parties, DOD has now produced all or most of the names, internment serial numbers, citizenship information, and dates and places of birth of the detainees held at Guantanamo. DOD has declined, however, to disclose photographs identifying past and present detainees, as well as information as to each detainee's weight and height. . . .

In moving for summary judgment on production of this information, DOD relied on Exemption 6 for both and, as to the photographs, FOIA Exemption 1, which exempts from disclosure records that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Excerpts follow from the court's analysis in granting DOD's motion for summary judgment as to the detainee photographs. The court denied DOD's motion as to

the height and weight information, directing DOD to furnish such information to AP.

---

* * * *

. . . The Executive Order here pertinent is Executive Order 12958, as amended, which permits a record to be classified if it concerns, inter alia, "intelligence sources or methods" and if "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." Executive Order 12958 § 1.1(a). Pursuant to that Order, the photographs of past and present detainees are presently classified at the "SECRET" level. . . .

In the portion of DOD's submissions that are not under seal, Paul Rester, Director of the Joint Intelligence Group, JTF-Guantanamo, and formerly the officer in charge of DOD interrogations at Guantanamo, justifies this classification by noting, first, that every detainee is a potential source of intelligence . . . . Rester further notes that, obviously, the detainees will not provide useful intelligence if they fear retaliation against themselves or their families. . . . On the basis of these considerations and his extensive experience, Rester then argues that disclosure of the detainees' photographs will increase the risk of retaliation because "release of photographs coupled with names (which may be common names) would specifically identify each detainee in a way that a release of names and other biographical information does not," and that, in any event, many detainees believe that harm will ensue from such disclosure and will fail to cooperate. It is on these grounds, he states, that DOD made its determination that disclosure of the photographs reasonably could be expected to result in serious damage to the national security. . . .

* * * *

. . . Based on the Court's [ex parte review of supplemental evidence filed under seal] and the particularized detail offered therein, the Court is satisfied that, as argued in the non-sealed portion of [a supplemental declaration by Mr. Rester], various detainees at Guantanamo continue to provide important intelligence; release of the photos would allow conclusive identification of some

such detainees in a manner that disclosure of names and other identifying information would not; official public disclosure of such photographs would both increase the risk of retaliation against the detainees and their families and exacerbate the detainees' fears of reprisal, thus reducing the likelihood that detainees would cooperate in intelligence-gathering efforts; and there remains a strong national security interest in withholding these photographs even though there has been limited unofficial disclosure of detainee photographs.

Accordingly, the Court hereby grants DOD's motion to withhold the photographs of past and present detainees pursuant to Exemption 1.

* * * *

5. Riot Control Agents

On September 27, 2006, Joseph Benkert, Principal Deputy Assistant Secretary of Defense for International Security Policy, testified before the Senate Committee on Armed Services, Subcommittee on Readiness and Management Support on U.S. policy and practice with respect to the use of riot control agents by the U.S. Armed Forces. Excerpts follow from Mr. Benkert's unclassified prepared statement, available at *www.dod.mil/dodgc/olc/docs/TestBenkert060927.pdf*. As Mr. Benkert explained, "[r]iot control agents are one of the non-lethal weapons that our military may use under certain circumstances and thus most of the issues in the report will need to be addressed in closed session."

---

* * * *

The policy governing the use of riot control agents by the U.S. Armed Forces is expressed principally in the Chemical Weapons Convention, the resolution of ratification of the Chemical Weapons Convention, and Executive Order 11850 [Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents (1975)]. The Administration agrees with the policy statement in

the National Defense Authorization Act for FY2006, section 1232 (the "Ensign Amendment"); namely, "It is the policy of the United States that riot control agents are not chemical weapons and that the President may authorize their use as legitimate, legal, and non-lethal alternatives to the use of force that, as provided in Executive Order 11850 (40 Fed. Reg. 16187) and consistent with the resolution of ratification of the Chemical Weapons Convention, may be employed by members of the Armed Forces in war in defensive military modes to save lives, including the illustrative purposes cited in Executive Order 11850."

* * * *

. . . [W]hen I refer to "riot control agents" in my testimony today I am referring to chemicals not listed in a Chemical Weapons Convention schedule which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. This includes for example, tear gas and pepper spray. I am not referring to the broader class of non-chemical non-lethal weapons that may sometimes be used for riot control or other similar purposes such as foams, water cannons, bean bags, or rubber bullets.

The Department of Defense has issued regulations, doctrine, and training materials providing guidance as to when riot control agents may be used. . . . I need to emphasize that use of riot control agents must comply with applicable law, including treaties and the law of war. Any use must be consistent with our obligations under the Chemical Weapons Convention and any use must be consistent with Executive Order 11850.

It may be difficult for many Americans to understand why their Armed Forces can use riot control agents in only defined circumstances when they see their local law enforcement agencies using them effectively every day. The United States military must operate within the parameters of the Chemical Weapons Convention and Executive Order 11850, which constrain the ability of our Armed Forces to use riot control agents in offensive operations in wartime and do not apply to our colleagues in law enforcement.

The Military Departments have established requirements that personnel receive training on riot control agents before they are

authorized to carry or employ them. I would note that this is not the typical training that recruits receive during boot camp to teach them to protect themselves against chemical agents, but specialized training on riot control agent deployment.

Annual training of service members also provides an opportunity for supplemental training in the use of riot control agents. For example, in accordance with the Geneva Conventions of 1949 and the Hague Convention of 1907, military personnel who may employ riot control agents, such as Military Police, are required to receive annual instruction on the law of armed conflict, which includes the subject of the permissible use of riot control agents, when relevant to operational duties.

* * * *

Before U.S. military personnel may use riot control agents, they must have the proper authorization. Pursuant to Executive Order 11850, Presidential approval is required prior to riot control agent use in war in defensive military modes to save lives. . . .

* * * *

In conjunction with the preparation of the report required by the Ensign Amendment, we initiated a review of the authorities applicable to the use of riot control agents under various circumstances in light of the changing environment in which armed conflicts are taking place. In such a dynamic environment, the peacekeeping, law enforcement, and traditional battlefield roles of deployed units may be present at different times within the same theater of operations. The use of riot control agents will be evaluated based on the particular unit or mission involved and the particular facts and circumstances of the mission at the requested time.

* * * *

6. Israel-Lebanon

On July 12, 2006, Hezbollah forces seized two Israeli soldiers in Israel and transported them to Lebanon. Israel responded with air strikes against suspected Hezbollah targets in Lebanon.

Ambassador John Bolton, U.S. Permanent Representative to the United Nations, responded to a question from a reporter, also on July 12, asking if the United States supported Israeli operations in southern Lebanon. Ambassador Bolton stated:

> I think that Secretary Rice has made clear that the kidnapping of the Israeli soldiers is an act of terrorism. It was an act committed across an international border. Israel clearly has the right to act in self-defense and that appears to be what they are carrying out at the present time. . . .

See www.un.int/usa/06_163.htm. On July 14, Ambassador Bolton addressed the public session of the Security Council on Lebanon, as excerpted below. The full text is available at *www.un.int/usa/06_168.htm*.

---

* * * *

Hizballah's incursions across the Blue Line on July 12 were a deliberate and premeditated provocation intended to undermine regional stability and are contrary to the interests of both the Lebanese and Israeli people. We unequivocally condemn the kidnapping by Hizballah, a terrorist organization, of two Israeli soldiers and call for their immediate and unconditional release.

Provocations across the Blue Line by terrorist groups highlight the urgent need for full and immediate compliance by Syria and Hizballah with relevant UN Security Council resolutions, including 1559, 1583, 1655, and 1680.

The international community has made clear its desire to see the central authority of the Government of Lebanon extended throughout the country.

In this context, we underscore the importance of the Security Council President's statement of June 18, 2000 and the Secretary-General's conclusion that as of June 16, 2000, Israel had withdrawn all its forces from Lebanon in accordance with UNSC resolution 425 and met the requirements defined in the Secretary-General's May 22, 2000 report.

As President Bush said yesterday, we are concerned about the fragile democracy in Lebanon. While we have been working very

hard with partners to strengthen the democracy in Lebanon, we are also making clear that the democratic aspirations of the Lebanese people must not be undermined by the irresponsible and destabilizing actions of Hizballah.

We have repeatedly made clear to Lebanon and Syria our serious concern about the presence of terrorist groups on their soil and the periodic attacks against Israel from groups and individuals in southern Lebanon.

All militias in Lebanon, including Hizballah, must disarm and disband immediately and the Lebanese government must extend and exercise its sole and exclusive control over all Lebanese territory.

President Bush has made clear that Syria and Iran must be held to account for supporting regional terrorism and their role in the current crisis. Syria provides safe haven to the militant wing of Hamas and provides material support to Hizballah, which also maintains an active presence in Syria. Iran's extensive sponsorship and financial and other support of Hizballah is well known and has been ongoing for decades. No reckoning with Hizballah will be adequate without a reckoning with its principal state sponsors of terror.

We call on Syria and Iran to cease their sponsorship and support of terrorist groups, in particular Hizballah and Hamas. For the third time in two weeks, we again call on Syria to arrest Hamas leader Khaled Meshal, who currently lives in Damascus. There is no excuse for a member state of the United Nations to continue to knowingly harbor a recognized terrorist.

The Secretary General's decision to send a senior level team to the region is a development that is welcomed by my government.

We are also engaged with the primary parties and other concerned leaders to help restore calm and achieve a resolution to this crisis. In fact, senior U.S. officials are in Jerusalem today for meetings. All parties in the region must accept their responsibilities for maintaining security and stability. We urge all parties to accept the principle that governments must exercise sovereign control over territory.

The United States remains firmly committed to working with others not only to resolve the present situation but toward building longer-term peace and stability in the region.

> On July 26, 2006, Secretary of State Rice met with representatives of the Lebanon Core Group and other countries in Rome and joined with her counterparts in adopting a statement issued at the conclusion of the meeting. As explained in the statement, the representatives met "to express the international community's deep concern about the situation in Lebanon and the violence in the Middle East, to enjoin urgent and substantial humanitarian assistance, and to discuss concrete steps that would allow a free, independent, and democratic Lebanon to exercise effective control over all of its territory." The full text of the statement, excerpted further below, is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

The Rome Conference participants expressed their determination to work immediately to reach with the utmost urgency a cease-fire that puts an end to the current violence and hostilities. That cease-fire must be lasting, permanent and sustainable.

The Rome Conference affirmed that the fundamental condition for lasting security in Lebanon is the Government's full ability to exercise its authority over all its territory. The participants noted that a framework of international decisions, including the G-8 statement of July 16, United Nations Security Council Resolutions 425, 1559 and 1680, the Lebanese national framework embodied in the Taif Accords, and 1949 Armistice Agreement represent the principles that govern the international community's efforts and responsibilities to help support the Government and people of Lebanon.

The participants called for the full implementation of these relevant UN Security Council Resolutions and the Taif Accords, which provide for the deployment of Lebanese Armed Forces to all parts of the country and the disarming of all militias.

An International Force in Lebanon should urgently be authorized under a UN mandate to support the Lebanese Armed Forces in providing a secure environment. The Rome Conference pledged its support for Lebanon's revival and reconstruction. . . .

Participants agreed that any lasting solution to Middle East tensions must be regional. They expressed their full commitment to the people of Lebanon, Israel and throughout the region to act immediately with the international community toward the goal of a comprehensive and sustainable peace.

In remarks to the press with Italian Foreign Minister D'Alema, UN Secretary General Annan, and Prime Minister Siniora, Secretary Rice stated as excerpted below. The full text of the news conference is available at *www.state.gov/secretary/rm/2006/69546.htm*.

* * * *

We know that the international community made a pledge to the people of Lebanon when we passed Resolution 1559 that we would help Lebanon, the Government of Lebanon to establish its authority fully within its country as a sovereign state without the interference of its neighbors and as a state that could fully exercise its control throughout its territory and that would have . . . complete control over any means of violence. . . . We are also making urgent efforts to deal with the humanitarian situation in Lebanon and we will continue to work with the United Nations and with all to alleviate the suffering of the Lebanese people.

Let me say in closing that there is much work to do and everyone has a role to play. We all committed to dedicated and urgent action to try and bring about an end to this violence that, indeed, would be sustainable and that would lea[ve] the Lebanese Government with the prospect of full control of its country. This is very important. We cannot—and I heard it many, many times during this conference—we cannot return to the status quo ante.

In that regard, I am glad that the Secretary General is going to use his good offices in whatever way that he can to try and gain an

understanding from other states that they have responsibilities, too. Syria has responsibilities under 1559 which it, in fact, has not exercised and we ask that they do. And we are also deeply concerned, as we have said, about the role of Iran. So it is indeed high time that everyone make a choice. We can have and the people of Lebanon deserve a stable, democratic, fully sovereign Lebanon at peace with itself and at peace with its neighbors.

* * * *

On July 25 Israeli forces fired on a UN observer post in Lebanon. In remarks to the press on July 26, Ambassador Bolton indicated that he and others were working on a presidential statement in the Security Council to address the incident, stating:

> . . .[T]he United States deeply regrets the tragic deaths of the four UNIFIL observers. . . . We are pleased that the government of Israel has announced that it will conduct an immediate investigation; we expect it will be thorough and highly professional. They have described the incident as one that is an operational mistake. The government of Israel has definitively said that they were not deliberately targeting the UNIFIL outpost. We certainly take them at their word and note that there is no evidence to the contrary, but the purpose of the investigation will be to get the full circumstances. . . .

See www.un.int/usa/06_185.htm.

The Security Council issued a Presidential Statement on July 27, 2006, stating that the Security Council was "deeply shocked and distressed by the firing by the Israeli Defense Forces on a United Nations Observer post in southern Lebanon on 25 July 2006, which caused the death of four United Nations military observers and called upon Israel to "conduct a comprehensive inquiry into this incident." S/PRST/2006/34, available at *http://documents.un.org*.

On July 30, the Security Council issued a further Presidential Statement in response to the destruction of

a residential building in Qana, Lebanon, S/PRST/2006/35, available at *http://documents.un.org.* Excerpts follow.

The Security Council expresses its extreme shock and distress at the shelling by the Israeli Defense Forces of a residential building in Qana, in southern Lebanon, which has caused the killing of dozens of civilians, mostly children, and injured many others. The Security Council sends its deepest condolences to the families of the victims and to the Lebanese people.

The Security Council strongly deplores this loss of innocent lives and the killing of civilians in the present conflict and requests the Secretary-General to report to it within one week on the circumstances of this tragic incident.

The Security Council expresses its concern at the threat of escalation of violence with further grave consequences for the humanitarian situation, calls for an end to violence, and underscores the urgency of securing a lasting, permanent and sustainable ceasefire.

* * * *

The Security Council affirms its determination to work without any further delay to adopt a resolution for a lasting settlement of the crisis, drawing on diplomatic efforts under way.

Ambassador Bolton, in an exchange with reporters also on July 30, stated that the United States was "pleased with the adoption of this Presidential Statement." Excerpts from further exchanges with reporters follow; the full text is available at *www.un.int/usa/06_192.htm.*

---

* * * *

Reporter: [Can you explain] [w]hy the Security Council couldn't condemn this act?

Ambassador Bolton: . . . [T]he Security Council deplored the loss of life. And I think that's what's important. It's the loss of civilian life that we regret. The question of whether it was an accident

is obviously something that will be investigated—that's what the government of Israel concludes and I think in that case it's a tragic consequence of an unavoidable accident in war, if that's the case. But we expressed what I think the council felt very strongly and that is that we were shocked by it and we regretted the loss of innocent life.

* * * *

Ambassador Bolton had had an exchange earlier in the day with reporters, excerpted briefly below on issues related to actions by Israel and by Hezbollah. The full text of the exchange is available at *www.un.int/usa/06_191.htm*.

---

* * * *

Reporter: The Lebanese government has said that it will not be able to evacuate those villages which the Israelis have asked them to do, but in the event that they don't [Israel] still will attack and that people will be killed. What can be done in such a circumstance?

Ambassador Bolton: I think that we have said to the government of Israel on many occasions they need to exercise care and restraint in the conduct of their military operations. And they have assured us that that is what they are doing. . . .

* * * *

Reporter: Is there anything the Security Council can do regarding Hezbollah potentially putting these rockets and the ammunition among the civilians?

Ambassador Bolton: . . . [I]t says something about the morality and respect for human life of Hezbollah, that they would use innocent civilians as shields. That's just something that for civilized people is not acceptable. That is why as well, in Israel's exercise of its legitimate right of self-defense, they have to take into account this barbaric practice that Hezbollah has and exercise the utmost restraint so that Lebanese civilians are spared the brunt of this conflict. . . .

* * * *

On August 11, 2006, the Security Council adopted Resolution 1701 that determined that "the situation in Lebanon constitutes a threat to international peace and security" and, among other things "call[ed] for Israel and Lebanon to support a permanent ceasefire and a long- term solution." The ceasefire took effect August 14, 2006. Resolution 1701 is discussed in Chapter 17.A.3.

7. Israel-Palestinian Authority

On June 25, 2006, Hamas abducted an Israeli corporal, Gilad Shalit, and launched rocket attacks from Gaza into Southern Israel. Israel responded with attacks on Gaza. On July 13, 2006, the United States vetoed a Security Council resolution that would have addressed this issue. Ambassador Bolton provided an explanation for the U.S. veto, discussing the conflict as excerpted below. Ambassador Bolton's comments are excerpted further in Chapter 17.A.3.; the full text is available at *www.un.int/usa/06_165.htm*.

---

* * * *

The United States worked hard with other delegations to achieve a more balanced text, one which acknowledged that Israeli military actions were in direct response to repeated rocket attacks into Southern Israel from Gaza and the June 25 abduction of Israeli Defense Force Corporal Gilad Shalit by Hamas. Regrettably, we were not able to reach consensus.

While we remain gravely concerned about the deterioration of the situation in the West Bank and Gaza, we remain steadfast in our conviction that the best way to resolve the immediate crisis is for Hamas to secure the safe and unconditional release of Corporal Shalit.

Establishing the foundations for a lasting peace, however, will require us to focus our attention not just on Hamas, but on the state sponsors of terror who back them—particularly Syria and Iran. Let us be clear that without the financial and material support of

Damascus and Tehran, Hamas would be severely crippled in carrying out its terrorist operations. We call upon Syria and Iran to end their role as state sponsors of terror and unequivocally condemn the actions of Hamas, including this kidnapping. We yet again call upon Syria to arrest the Hamas ringleader, Khaled Meshal, who currently resides in Damascus. We stress again our condemnation of Syrian and Iranian support of Hizballah, which has claimed responsibility for the other kidnappings along the Blue Line between Israel and Lebanon.

We further call on the Palestinian Authority government to stop all acts of violence and terror and comply with the principles enunciated by the Quartet: renounce terror, recognize Israel, and accept previous obligations and agreements, including the Roadmap. The failure of the Palestinian Authority to take these steps hurts the Palestinian people.

We are obviously concerned about the duration of the present difficulties and the lack of a solution, but the issue for us is whether action by this Council makes such a solution more or less likely, not simply whether or not the Council seems to be "engaged".

The United States remains firmly committed to working with others to establish the foundations for a lasting peace in the region—a foundation that would have been undermined had this draft Resolution passed.

* * * *

On November 11, 2006, the United States vetoed a second Security Council resolution. Ambassador Bolton's comments, excerpted below, are discussed further in Chapter 17. A.2.c(1) and available at *www.un.int/usa/06_328.htm*. In a statement to the Security Council on November 9, Ambassador Bolton "again call[ed] for the immediate and unconditional release of Corporal Shalit." The full text of his statement is available at *www.un.int/usa/06_323.htm*.

---

* * * *

We join our fellow Council members in deeply regretting the injuries and loss of life on November 8 in and around Beit Hanun.

We note the Israeli government has conducted an investigation and has announced its intent to suspend all artillery fire into Gaza as a result. We hope it will be completed quickly and that appropriate steps will be taken to avoid a repetition of this tragedy.

. . . [The resolution] remains an unbalanced text. . . .

. . . [W]e are disturbed that there is not a single reference to terrorism in the proposed resolution, nor any condemnation of the Hamas leadership's statement that Palestinians should resume terror attacks on a broad scale, or calls by the military wing of Hamas to Muslims worldwide to strike American targets and interests. More terror, whether directed at Israel or the United States or the European Union Office in Gaza City is not the solution, nor will it enable the Palestinian people to achieve their aspirations.

* * * *

8. Iraq

On November 28, 2006, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1723 extending the mandate of the multinational force authorized in Resolution 1546 (2004) ("MNF-I"), until December 31, 2007 "taking into consideration the Iraqi Prime Minister's letter dated 11 November 2006, and the United States Secretary of State's letter dated 17 November 2006." The resolution also extended arrangements related to the deposit of proceeds from export sales of petroleum, petroleum products, and natural gas into the Development Fund for Iraq until December 31, 2007, and provided for review of both extensions no later than June 15, 2007.

In her November 17 letter responding to the November 11 letter of Prime Minister Nuri al-Maliki (both annexed to Resolution 1723) Secretary of State Rice summarized the understanding concerning the extension of MNF-I as follows:

> The Government of Iraq and MNF in Iraq continue to improve their cooperation through a security partnership to combat the challenges that threaten Iraq's security

> and stability. . . . The forces that make up MNF will remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict. Iraqi security forces have already made substantial progress this year in developing their capabilities and, as a result, they are shouldering a greater portion of the responsibility for Iraq's security. . . .
>
> The Government of Iraq and MNF have agreed on three common goals: Iraqi assumption of recruiting, training, equipping and arming of the Iraqi security forces; Iraqi assumption of command and control over Iraqi forces; and transferring responsibility for security to the Government of Iraq. We look forward to recommendations from the newly formed high-level working group on how these goals can best be achieved. The strong partnership between the Government of Iraq and MNF is a vital factor in fulfilling these goals. Together we will build towards the day when the Iraqi forces assume full responsibility for the maintenance of security and stability in Iraq.

Ambassador Bolton issued a statement following adoption of Resolution 1723, stating:

> The United States notes the request of the Iraqi government for the continuing support of the Multinational Force in Iraq (MNF-I) in helping it face the current security challenges and welcomes the Security Council's speedy adoption of this resolution to extend for an additional 12 months the mandate set out in UN Security Council Resolution 1546, as well as the arrangements for the Development Fund for Iraq and the International Advisory and Monitoring Board. The MNF-I continues to play a vital role in the security and stability of Iraq. It is also working in close partnership with the Iraqi government toward the development of Iraq's ability to assume responsibility for the country's security. The United States remains committed to a unified, democratic

and prosperous Iraq and looks forward to the continued cooperation of the international community for Iraq's future.

See www.un.i\nt/usa/06_370.htm.

On November 30, 2006, President Bush and Prime Minister Maliki issued a joint statement following a meeting in Amman, Jordan, "to continue our consultations on building security and stability in Iraq." The statement reviewed recent developments, as excerpted below. The full text of the joint statement is available at 42 WEEKLY COMP. PRES. DOC. 2112 (Dec. 4, 2006).

---

* * * *

Our discussions reviewed developments in Iraq, focusing on the security situation and our common concern about sectarian violence targeting innocent Iraqis. In this regard, the Prime Minister affirms the commitment of his government to advance efforts toward national reconciliation and the need for all Iraqis and political forces in Iraq to work against armed elements responsible for violence and intimidation. The Prime Minister also affirms his determination with help from the United States and the international community to improve the efficiency of government operations, particularly in confronting corruption and strengthening the rule of law.

. . . The Prime Minister affirmed that Iraq is a partner in the fight against Al Qaeda. We agreed that defeating Al Qaeda and the terrorists is vital to ensuring the success of Iraq's democracy. We discussed the means by which the United States will enhance Iraq's capabilities to further isolate extremists and bring all who choose violence and terror to full justice under Iraqi law.

We agreed in particular to take all necessary measures to track down and bring to justice those responsible for the cowardly attacks last week in Sadr City. The Prime Minister has also pledged to bring to justice those responsible for crimes committed in the wake of this attack.

We discussed accelerating the transfer of security responsibilities to the Government of Iraq; our hopes for strengthening the future relationship between our two nations; and joint efforts to achieve greater cooperation from governments in the region and to counter those elements that are fueling the conflict.

We received an interim report from the high-level Joint Committee on Accelerating the Transferring of Security Responsibility, and encouraged the Committee to continue its good work. We agreed that reform of the Iraqi security ministries and agencies and addressing the issue of militias should be accelerated. The ultimate solution to stabilizing Iraq and reducing violence is true national reconciliation and capable and loyal Iraqi forces dedicated to protecting all the Iraqi people.

We are committed to continuing to build the partnership between our two countries as we work together to strengthen a stable, democratic, and unified Iraq.

B. ARMS CONTROL AND DISARMAMENT

1. Biological Weapons Convention

The United States participated in the Sixth Review Conference of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and On Their Destruction ("Biological Weapons Convention" or "BWC"), held from November 20 - December 8, 2006, in Geneva. The review conference convenes every five years. On November 20, 2006, Assistant Secretary of State for International Security and Nonproliferation John C. Rood addressed the conference, as excerpted below. The full text of Mr. Rood's opening statement is available at *www.usmission.ch/Press2006/2011Rood.html*. *See also* press briefing by Mr. Rood on the same date, available at *www.usmission.ch/Press2006/1120RoodPress.html*.

Over thirty years ago, the Biological Weapons Convention entered into force as the key legal and normative barrier to the spread of

biological weapons. The Convention's condemnation of biological weapons "as repugnant to the conscience of mankind" holds as true today as it did when the BWC was signed in 1972.

The United States believes that the BWC today is strong. We reaffirm our commitment to the Convention and underscore that it continues to serve as an important international norm against the use of biology as a weapon.

Yet the world is a very different place today than in 1972. During the Cold War, countries were concerned mostly about state-run programs. Now we also must recognize the grim prospect of terrorist organizations using biology as a weapon of terror and mass destruction, and we must gird ourselves to respond to new and evolving threats.

When States Parties to the Biological Weapons Convention gathered at the resumed Fifth Review Conference in November 2002, the international effort to combat the biological weapons threat took a pragmatic and measurable step forward. States Parties recognized the necessity of a three-pronged strategy of national, bilateral and multilateral measures and unanimously adopted a tailored program of work to confront the biological weapons threat in today's strategic environment—in which threats come from rogue states and terrorists.

It is with these threats in mind, that we must continue to strengthen our efforts and adapt our nonproliferation and counterproliferation tools to stop the development and transfer of biological weapons.

* * * *

With regard to compliance, fundamental to the success of the BWC and its goal of ridding the world of biological weapons is full and effective compliance by all States Parties. Noncompliance with the central obligation of the BWC poses a direct threat to international peace and security, and compliance concerns must be pursued vigorously. For this reason, such concerns must be raised not only at Review Conferences every five years, but addressed by States Parties with urgency as they arise. For our part, since the last review conference, the United States has engaged several states through diplomatic channels on issues of possible non-compliance with Article I and other BWC obligations.

Noncompliance with the fundamental requirement not to develop biological weapons is of paramount concern. It would be irresponsible to strengthen the superstructure of the Convention and yet turn a blind eye to problems with the foundation itself. The U.S. has concerns with the actions of a number of states and we publicly detail our compliance concerns in an annual report to the U.S. Congress.

* * * *

We believe that the regime in Iran probably has an offensive biological weapons program in violation of the BWC. Similarly, we also believe North Korea has a biological warfare capability and may have developed, produced, and weaponized for use biological weapons, also in violation of the BWC. Finally, we remain seriously concerned that Syria—a signatory but not a party to the BWC—has conducted research and development for an offensive BW program.

The U.S. understands that the problem of noncompliance with the BWC is difficult but it must be faced head-on. The international community must always remain vigilant and steadfast, and root out violators that undermine the integrity of the Convention.

National Implementation

* * * *

When there are suspicions of illicit BW activities, the Convention requires each State Party be more than just watchful and determined. States Parties are obligated to undertake national measures to implement the Convention. Specifically, Article III prohibits States Parties from providing sensitive technologies—either directly or indirectly—to any person, group, or country that might seek to acquire biological weapons. Furthermore, Article IV requires that State[s] Parties vigilantly regulate and monitor biological activities within their own country or in areas under their jurisdiction or control, and aggressively pursue and prosecute those who would seek to use disease as a weapon of terror, destruction, or death. These obligations necessitate that States Parties implement effective export controls.

There is a clear international consensus that national measures are critical, particularly in our efforts to prevent the proliferation of WMD and their related materials. In 2004, the United Nations Security Council recognized the importance of the adoption and enforcement of effective export controls by requiring all states to criminalize proliferation under UN Security Council Resolution 1540. Resolution 1540 mandates that all states take and enforce effective measures to establish domestic controls that will prevent the proliferation of biological weapons and other weapons of mass destruction and their means of delivery.

The United States has taken several measures to implement its obligations under the BWC and Resolution 1540, and we reiterate our willingness to provide assistance to States Parties to adopt national measures.

* * * *

Review Conference Objectives

* * * *

In many respects, the situation is similar to that of the Chemical Weapons Convention prior to the adoption in 2003 of an Action Plan on national implementation. The significant progress that has been made under this CWC initiative can be replicated in the BWC context. The United States believes this Review Conference in its final declaration should endorse an "Action Plan on National Implementation" consisting of specific steps to be taken by States Parties, with progress reviewed periodically during the intersessional period before the Seventh Review Conference in 2011.

A second imperative warranting a dedicated Action Plan is the lack of universal membership in the Biological Weapons Convention. With 155 States Parties, membership in the BWC ranks substantially behind that of other multinational nonproliferation treaties. The Nuclear Non-proliferation Treaty has 188 States Parties, while the Chemical Weapons Convention has 180 States Parties. Although the UN General Assembly annually calls upon states to join the BWC, there has been no concerted universality effort and little expansion of BWC membership for many years. . . .

In addition, we hope that during the Article-by-Article review performed over the coming weeks and in our final declaration, that BWC States Parties will explicitly endorse the importance of national export control measures in fulfilling the obligations under the Convention and fully commit to complying with UN Security Council Resolution 1540.

The Next Intersessional Work Program

I will now turn to our proposals with respect to the intersessional work program leading up to the Seventh Review Conference. . . .

The United States will support meetings of technical experts in Geneva for key implementation areas. We believe that two of the topics addressed between 2003 and 2005 are clearly worthy of further consideration and progress, with a special emphasis on promoting cooperation in these areas. The first is disease surveillance. This was one of the most productive and well-attended meetings of the intersessional period. Subsequent emergence of the avian influenza threat has underscored the importance of national and international efforts to address infectious disease. The United States strongly favors continued effort in this area.

A second area worthy of follow-up effort is biosecurity, that is, the challenge of keeping dual-use equipment and biological materials secure from theft and misuse, especially with regard to terrorism. To enhance progress in this area, we would propose that special emphasis be placed on international cooperation and the closely linked issue of biosafety.

The United States has also identified two new areas for intersessional focus. With respect to national legislation to outlaw illicit BW activities, we believe that enforcement needs to be squarely addressed. Parties to the BWC have a shared interest in ensuring that non-state actors who might engage in BWC-prohibited activities are apprehended and prosecuted. We would therefore propose a session where experts would share experiences related to investigation and prosecution of BW-related crimes, particularly those involving international cooperation, and discuss possibilities of further future collaboration.

Another issue we believe should be addressed concerns codes of conduct related to national activities to prevent misuse of biological research. In the life sciences, the same techniques used to

gain insight and understanding for the benefit of human health and welfare may also be used to create a new generation of BW agents. In this proposed session, states would report on steps that have been taken at the national level since the discussions in 2005 and discuss possibilities for international cooperation and coordination.

* * * *

2. Chemical Weapons Convention

a. Extension of deadline for complete destruction of chemical weapons stocks

On April 20, 2006, the United States submitted a request to the Executive Council of the Organization for Prohibition of Chemical Weapons ("OPCW") for an extension of the deadline for destroying all chemical weapons stocks by April 29, 2007, pursuant to the Convention on The Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Chemical Weapons Convention" or "CWC").* As explained in the request:

> The United States was granted an extension "in principle" of the April 29, 2007 Phase 4 deadline for destruction of all its declared Category 1 Chemical Weapons (CW) by the Eighth Conference of the States Parties in October 2003 (C-8/DEC.15). It was understood at the time of adoption of this decision that a proposal for a specific revised deadline would be submitted to the Executive Council by the United States not later than April 29, 2006, in accordance with Part IV (A), paragraphs 24 and 25 of the CWC's Verification Annex. The United States hereby requests an extension of the 100% deadline to April 29, 2012.

* As provided in Part IV(A), paragraph 24, of the Verification Annex to the Chemical Weapons Convention, such requests must be filed with the OPCW Executive Council not later than 10 years after the entry into force of the Convention (April 29, 1997), and, pursuant to paragraph 26, any extension is limited to 15 years after entry into force.

The United States also explained that it planned to take steps "that may accelerate the schedule of chemical agent destruction, but at this time we do not expect to be able to meet the proposed April 29, 2012 deadline for destruction of the U.S. declared stockpile of CW. The Executive Council may wish to consider how best to address this situation closer to the deadline."

The full text of the U.S. request is available at *www.state.gov/documents/organization/64997.pdf.* A fact sheet released by the Department of State on April 20, 2006, explained the request as excerpted below. The full text of the fact sheet is available at *www.state.gov/t/isn/rls/fs/64874.htm.*

- The United States is requesting an extension of the Chemical Weapons Convention (CWC) deadline for destroying 100% of CW stocks from April 29, 2007 to April 29, 2012. (The CWC requires such a request be submitted by April 29, 2006.)
- The U.S. remains deeply committed to the CWC and eliminating its entire stockpile of chemical weapons by the earliest possible date, in a safe and secure manner.

The U.S. Record to Date on CW Destruction

- As of March 31, 2006 the U.S. has destroyed 10,103 metric tons of chemical agent since entry-into-force of the CWC, or 36.4% of its declared inventory of 27,768 metric tons, far more than all other declared CW possessors combined.
- The U.S. has completed operations at two chemical weapons destruction facilities (CWDFs) at Johnston Island and Aberdeen, Maryland. Six other major facilities are currently operating. Site preparations are underway for construction of the final two CWDFs.
- The U.S. met its 1% and 20% destruction deadlines early, and is working towards its 45% destruction milestone date of December 31, 2007, as extended by the OPCW.

- The U.S. has devoted enormous resources to the effort to safely and expeditiously destroy its CW stocks, including over $1.5 billion in 2005, and a projected $32-34 billion over the lifetime of the project (for comparison—total 2005 budget for OPCW was $91.6 million).
- Have concentrated on destroying our most lethal weapons first, specifically VX and sarin nerve agent, with over 86% of the latter already destroyed. Will finish destruction of binary agents—our most modern stocks—by the end of 2007.

Reasons for the Proposed Extension

- Destroying the world's 2nd largest stockpile safely is extraordinarily difficult and complex.
- The U.S. has encountered delays in initiating operations and lower-than-planned destruction rates for reasons listed below:
  - o Delays in obtaining environmental permits necessary to start operations;
  - o Start-up delays due to additional community emergency preparedness requirements;
  - o Longer than projected downtime for maintenance and changeover to other agents;
  - o Work stoppages to investigate and resolve problems, along with reductions in throughput;
  - o Development of protocols to improve operational safety; and
  - o Deteriorating munitions more challenging to handle and safely destroy than anticipated.
- The U.S. continues to improve as the program progresses, incorporating lessons learned at the start of each new facility.

Plan for Destruction During the Proposed Extension

- The U.S. plans to incorporate lessons learned and risk mitigation measures that may accelerate the schedule of chemical agent destruction, but at this time, we do not expect to be able to meet the April 29, 2012 deadline for destruction of the U.S. declared CW stockpile.

- Current projections indicate that four facilities will be operating past 2012 (Tooele, Anniston, Umatilla, and Pine Bluff), and two facilities that have not yet been constructed (in Pueblo and Bluegrass) are expected to commence destruction operations no earlier than 2011.
- The U.S. has evaluated a number of alternatives to improve our CW destruction progress in order to meet the existing timelines, but has not identified at this time an option or combination of options that would result in the U.S. meeting the 2012 extended deadline.
- The U.S. continues to seek opportunities to improve our CW destruction progress in order to complete destruction with the goal of reaching the 2012 deadline or if that is not possible completing destruction as soon as feasible thereafter.

* * * *

At the 11th Session of the Conference of States Parties to the CWC, meeting in The Hague, Eric M. Javits, head of the U.S. delegation, noted the U.S. extension request and that:

> Experience has shown that the task of eliminating the legacy of chemical weapons stocks has proven more difficult than any of us imagined. All but one of the declared possessor States have had to request extensions to the 100% percent destruction deadline. While there are great challenges, the commitment to complete destruction of all CW stocks is very clear. . . .

On December 8, 2006, the Conference of the States Parties granted the U.S. request for extension until April 29, 2012. OPCW Doc. C-11/DEC.17, available at *www.opcw.org/docs/csp/csp11/en/c11dec17(e).pdf*.

b. National implementation measures

On December 6, 2006, Assistant Secretary of Commerce Christopher Padilla addressed the 11th Session of the Conference of States Parties in The Hague on Article VII,

National Implementation Measures. Mr. Padilla's remarks, excerpted below, are available in full at *www.state.gov/t/isn/rls/rm/79044.htm*.

---

* * * *

Last year, the Conference adopted a decision on Article VII that established reporting obligations for States Parties, set benchmark dates for completing tasks, and called upon the Executive Council, the Technical Secretariat and States Parties to work together in the implementation effort. The United States is pleased to note that there has been measurable progress over the past year, due in part to the continued emphasis placed on this issue by the previous Conference.

* * * *

Significant work still remains. While most States Parties have now either adopted or drafted legislation, several areas of national implementation merit sustained attention and scrutiny. For example, fewer than half of States Parties have:

- adopted all necessary measures to control transfers of Scheduled chemicals;
- established penalties for failure to provide data on Article VI declarations; and
- adopted legislation covering all key areas.

. . . Our long-term objective must continue to be universal and comprehensive compliance with the obligations of the Chemical Weapons Convention.

To ensure that this commitment is not an empty one, it is important to set realistic, achievable milestones on the road to universal implementation. Moving forward from this Conference, therefore, the United States urges that we focus first on those chemical-related activities that are most relevant to the object and purpose of the Convention: the production and trade of organic chemicals.

Therefore, our most immediate implementation priority should be to ensure that all States Parties that play prominent roles in the production and trade of organic chemicals have fully met their Article VII obligations.

* * * *

There are three important steps in achieving this goal:

First, the Conference should embrace the Article VII decision that is before us this week. . . .

Second, it is crucial for the Executive Council early next year to adopt a decision relating to submission of nil declarations. Currently, States Parties are required to submit annual declarations on Article VI activity if it surpasses the declaration thresholds established in the Convention. The absence of any declaration leaves the Technical Secretariat in doubt whether there are activities that should be monitored and verified. Agreement early next year on a nil declaration and a requirement for provisional implementation would better enable the Technical Secretariat to determine how close we are to achieving the goal of ensuring that States Parties have fully complied with their national implementation obligations, including declaration of all relevant chemical activities.

Third, it is important for governments to form partnerships to prepare for implementation. One such partnership is technical assistance, and I am pleased to note that the United States has partnered with the Technical Secretariat to provide more than twenty-five technical assistance visits in the last two years. The Implementation Assistance Programme (IAP), co-developed by the United States and Romania, has proven a useful tool for States Parties seeking to meet their implementation requirements. To expand the reach of this tool, U.S. representatives will be distributing Spanish and French translations of the IAP at this Conference, and we will make the tool available on our website at www.cwc.gov.

The IAP was designed to help governments. But we know from our own experience how important it is for governments also to partner with industry to identify potentially declarable chemical producers and traders and to assist them in preparing for implementation. To help, I am pleased to announce today that the United States has developed a Global Chemical Industry Compliance

Program (GC-ICP) as a companion to the IAP. This simple, five-step program is designed to assist chemical industries in complying with the CWC and related national implementation obligations. It includes sample company policy statements, personnel and training programs to comply with CWC obligations, and procedures to determine whether a chemical facility has declaration and record keeping requirements. The document . . . will also be available on our website at www.cwc.gov.

* * * *

c. U.S. implementing regulations

On April 27, 2006, the Department of Commerce, Bureau of Industry and Security, published a final rule updating the Chemical Weapons Convention Regulations. 71 Fed. Reg. 24,917 (April 27, 2006). Excerpts below from the Supplemental Information section of the Federal Register publication provide a summary of U.S. implementation of the convention.

---

* * * *

On April 25, 1997, the United States ratified the Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The CWC, which entered into force on April 29, 1997, is an arms control treaty with significant nonproliferation aspects. As such, the CWC bans the development, production, stockpiling or use of chemical weapons and prohibits States Parties to the CWC from assisting or encouraging anyone to engage in a prohibited activity. The CWC provides for declaration and inspection of all States Parties' chemical weapons and chemical weapon production facilities, and oversees the destruction of such weapons and facilities. To fulfill its arms control and nonproliferation objectives, the CWC also establishes a comprehensive verification scheme and requires the declaration and inspection of facilities that produce, process or consume certain "scheduled" chemicals and unscheduled discrete organic chemicals, many of which have significant commercial applications.

The CWC also requires States Parties to report exports and imports and to impose export and import restrictions on certain chemicals. These requirements apply to all entities under the jurisdiction and control of States Parties, including commercial entities and individuals. States Parties to the CWC, including the United States, have agreed to this verification scheme in order to provide transparency and to ensure that no State Party to the CWC is engaging in prohibited activities.

The Chemical Weapons Convention Implementation Act of 1998 (the Act or CWCIA) (22 U.S.C. 6701 *et seq.*), enacted on October 21, 1998, authorizes the United States to require the U.S. chemical industry and other private entities to submit declarations, notifications and other reports and also to provide access for on-site inspections conducted by inspectors sent by the Organization for the Prohibition of Chemical Weapons. Executive Order (E.O.) 13128 delegates authority to the Department of Commerce to promulgate regulations, obtain and execute warrants, provide assistance to certain facilities, and carry out appropriate functions to implement the CWC, consistent with the Act. The Department of Commerce implements CWC import restrictions under the authority of the International Emergency Economic Powers Act, the National Emergencies Act, and E.O. 12938, as amended by E.O. 13128. The Departments of State and Commerce have implemented the CWC export restrictions under their respective export control authorities. E.O. 13128 designates the Department of State as the United States National Authority (USNA) for purposes of the CWC and the Act.

On December 30, 1999, the Bureau of Industry and Security (BIS), U.S. Department of Commerce, published an interim rule that established the Chemical Weapons Convention Regulations (CWCR) (15 CFR Parts 710-722). The CWCR implemented the provisions of the CWC, affecting U.S. industry and U.S. persons, in accordance with the provisions of the Act. This final rule revises the CWCR by updating them to remove outdated provisions (e.g., the initial declaration requirements in parts 713, 714, and 715) and include additional requirements identified as necessary for the implementation of the CWC provisions and by clarifying other CWC requirements. The changes made by this rule were addressed

in a proposed rule and request for public comments that BIS published on December 7, 2004.

* * * *

3. Strategic Arms Reduction Treaty

In 2006 the twenty-eighth and twenty-ninth sessions of the Strategic Arms Reduction Treaty ("START" or "Treaty") Joint Compliance and Inspection Commission ("JCIC") were held in Geneva. The sessions were shorter than previous sessions, as proposed by the United States, and very focused. The primary accomplishments of these sessions were two-fold: resolving, formally, changes in site diagrams of certain START facilities; and resolving a long-standing issue surrounding inspection of the U.S. Trident-II submarine-launched ballistic missile ("SLBM").

The START provides, in Article XV, that the parties may "agree upon such additional measures as may be necessary to improve the viability and effectiveness of [the] Treaty." This allows the parties to agree on administrative or technical changes (often called "V & E changes") to improve the implementation of the Treaty that would not affect the substantive rights and obligations of the Parties. Such documents have taken two forms: JCIC Agreements, in which a provision of one of the Treaty's Protocols (or another of the Treaty documents such as the Treaty's Memorandum of Understanding) is amended; and JCIC Joint Statements, in which the parties come to a legally-binding "understanding" as to how a specific provision of the Treaty or of a Protocol should be interpreted.

One type of Joint Statement is known as an S-Series Joint Statement, which codifies the parties' agreement on changes in site diagrams. Four S-Series Joint Statements were initialed in 2006—three of them dealing with Russian facilities, Joint Statements 22, 24, and 25. The fourth S-Series Joint Statement dealt with a Russian-operated facility (Leninsk) in Kazakhstan, Joint Statement S-26. The texts of the four statements are available at *www.state.gov/s/l/c8183.htm*.

Kazakhstan was not present at the JCIC meeting when Joint Statement S-26 was initialed. Pursuant to the JCIC Protocol to START, the parties can make use of a "silence procedure" whenever a party is not able to sign an agreement because of absence from the JCIC or other reasons. Under the silence procedure, the document will enter into force 30 days after signature unless the absent Party objects. The silence procedure applies only to the four parties who are successor states to the Soviet Union; the United States, as the single entity on "its side of the table" must sign any agreement or joint statement for it to be valid.

The silence procedure does not apply, however, if any party decides that an absent party, due to the nature of the agreement, must expressly manifest consent. Because the Leninsk facility is in Kazakhstan, the United States determined that Kazakhstan must expressly consent to the relevant S-Series Joint Statement. Jerry A. Taylor, U.S. Representative to the JCIC, provided a statement to the Twenty-ninth Session of the JCIC, dated October 26, 2006, recording the U.S. position as excerpted below. The United States transmitted a copy of Joint Statement S-26 to the Representative of the Republic of Kazakhstan to the JCIC by letter of the same date. The full texts of the statement and the cover letter are available at *www.state.gov/s/l/c8183.htm*. At the end of 2006, Kazakhstan had taken no action and Joint Statement S-26 had not entered into force.

The United States of America,

* * * *

Pursuant to paragraph 6 of Annex 1 to the Protocol on the Joint Compliance and Inspection Commission Relating to the Treaty, hereinafter referred to as the JCIC Protocol,

Identifies as an agreement to which the provisions of subparagraph 6(c) of Annex 1 to the JCIC Protocol shall not apply:

JOINT COMPLIANCE AND INSPECTION COMMISSION JOINT STATEMENT NUMBER S-26 ON CHANGES TO THE BOUNDARY OF THE LENINSK TEST RANGE

The reason for making such identification is as follows:

The Leninsk Test Range is located on the national territory of the Republic of Kazakhstan. This Joint Statement is therefore of direct concern to the Republic of Kazakhstan.

* * * *

In addition, the START Parties exchanged two non-legally binding policy statements. The first resolved an issue that emerged relatively recently on a U.S. inspection inside Russia, where the members of the inspection team encountered some closed containers that they were not able to open and inspect. The full text of the statement to the 28th JCIC plenary, dated June 1, 2006, is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

The United States notes the statement by the Russian Federation that Russia will supplement existing procedures for the conduct of data update inspections at the Bershet' Conversion or Elimination Facility with respect to the inspection of SS-25 ICBM first stages in containers used for transportation and storage at that facility. . . .

A U.S. inspection team will not declare an ambiguity in the official inspection report based on the fact that the containers used for transportation and storage of the SS-25 ICBM first stages had not been opened, provided the inspectors are satisfied, using the photographs and unique identifiers provided, that the containers match the type of container used for transportation and storage of SS-25 ICBM first stages and the unique identifiers correspond to missiles attributed to the Votkinsk Machine Building Plant.

The United States notes that this arrangement is without prejudice to the right of the United States to view and measure the contents of containers large enough to contain items of inspection, as set forth in Paragraph 5 of Annex 1 to the Inspection Protocol. In the event inspectors are unable to identify an object declared by the escort to be a container containing an SS-25 ICBM first stage, the inspectors have the right to request to view and measure the

contents of the container in accordance with Paragraph 5 of Annex 1 to the Inspection Protocol.

The second plenary statement exchanged by the Parties resolved a longstanding Russian concern, dealing with the confirmation of Trident I SLBMs in their liners, and Trident II SLBMs in their loading tubes. This issue arose not long after entry into force of the START Treaty. The policy statement entered into force pursuant to the terms of the penultimate paragraph excerpted below. The full text of the statement of policy is available at *www.state/s/l/c8183.htm*.

The United States of America makes the following statement concerning its plans with respect to inspection of Trident I SLBMs in liners and Trident II SLBMs in loading tubes during data update inspections.

Based on the demonstrations provided by the United States of America on June 13-16, 2000, which illustrated the unique relationship between the Trident I SLBM and its liner and the Trident II SLBM and its loading tube, the United States of America expects that, during all future data update inspections at Strategic Weapons Facility Pacific, Silverdale, Washington, hereinafter referred to as the Silverdale Submarine Base, and Strategic Weapons Facility Atlantic, Kings Bay, Georgia, hereinafter referred to as the Kings Bay Submarine Base, inspection teams will use the Trident Reference Aid in conjunction with the indirect measurement procedures set forth in JCIC Joint Statement 25 and the viewing procedures set forth in the Inspection Protocol to confirm missile type for a Trident I and Trident II SLBM with the missile in its liner or loading tube.

The United States of America understands that the inspecting Party will, as a matter of policy, request that the inspected Party remove a Trident II SLBM from its loading tube no more than once each year.

The United States of America notes that safety and security requirements, and time constraints during data update inspections at Silverdale Submarine Base and Kings Bay Submarine Base do not permit advance opening of all the access hatches that were

opened during the relevant June 2000 demonstration on all liners and loading tubes containing an SLBM.

As a practical approach to confirming the type of Trident I SLBM in its liner and Trident II SLBM in its loading tube during future inspections, the United States of America will use [the procedures set forth in this statement]. . . .

* * * *

The United States of America notes that this statement of policy, and the statements of policy made by the other Parties on this matter, will enter into force 30 days after completion of the first data update inspection that is conducted at the Silverdale Submarine Base or Kings Bay Submarine Base after all Parties exchange statements of policy on this matter, provided that, during those 30 days, no Party raises questions through diplomatic channels that: 1) were recorded in the report for that inspection; 2) addressed the inability of inspectors to confirm missile type using the procedures contained in this statement; and, 3) were not resolved on-site during the inspection.

The United States of America reaffirms that the use of the Trident Reference Aid, the indirect measurement procedures set forth in JCIC Joint Statement 25, and the viewing procedures set forth in the Inspection Protocol in no way will impinge on the inspection team's right to request the removal of a Trident SLBM from its liner or loading tube if the inspection team is unable to confirm the missile type by viewing and measuring the missile in its liner or loading tube in conjunction with these procedures.

C. NONPROLIFERATION

1. U.S. Compliance with International Law on Nuclear Weapons

On October 10, 2006, Ronald Bettauer, Deputy Legal Adviser, U.S. Department of State, addressed the Lawyers' Committee on Nuclear Policy of the New York City Bar on the topic "Is the United States in Compliance with International Law on Nuclear Weapons?" Excerpts below from Mr. Bettauer's remarks as prepared for delivery provide the basis for his conclusion that

"the United States has not only complied with its international legal obligations regarding the threat or use of nuclear weapons, but has worked assiduously to implement its disarmament obligations under the NPT." The full text of Mr. Bettauer's remarks is available at *www.state.gov/s/l/c8183.htm*.

---

* * * *

. . . The occasion for this discussion is the 10th anniversary of the ICJ's advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. So, I will begin by considering the international law relevant to nuclear weapons through the lens of the court's advisory opinion. We should keep in mind, of course, that the opinion was intended to provide advice to the UN General Assembly and that the Court's conclusions are advisory, not legally binding. Because the topic of today's discussion is broader than the threat or use of nuclear weapons, I will also briefly review the relevant treaty obligations regarding disarmament, focusing particularly on article VI of the Treaty on the Nonproliferation of Nuclear Weapons (NPT).

* * * *

As you will recall, in 1996 the ICJ issued its advisory opinion in response to the following question posed by the UN General Assembly: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" [I will summarize briefly t]he answers in the Court's dispositif . . . :

—First, having examined both customary international law and conventional international law, the Court concluded that there is neither any specific authorization for the threat or use of nuclear weapons nor any comprehensive and universal prohibition against the threat or use of nuclear weapons.

—Next, the Court stated unanimously that "a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful" and that a threat or use of nuclear weapons "should also be compatible with the requirements of the international law applicable in armed conflict,

particularly international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons";

—Then comes the Court's most contentious finding—not easily interpreted, much less applied. It stated: "it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." This finding was reached by a 7-7 vote, with a "casting vote" by President Bedjaoui. There is no reasoning in the opinion supporting this finding.

—Finally, going beyond the scope of the question asked, the Court concluded by stating that: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control."

* * * *

At the time the Court's opinion was rendered, the United States made clear that, even though the United States had opposed the Court's decision to respond to the General Assembly's request because of the question's highly abstract and hypothetical nature, we believed that much of the Court's discussion was generally reflective of the state of international law in this area. We also made clear that the United States did not believe the Court's response, which as I noted is not binding on Governments in any event, necessitated any changes in the nuclear posture and policy of the United States, including with respect to the Court's finding relating to nuclear disarmament negotiations.

DISARMAMENT OBLIGATIONS UNDER NPT ARTICLE VI

The Court's statement on disarmament obligations was based on its view of the undertaking in article VI of the Nuclear Nonproliferation Treaty. . . .

. . . As an initial matter, it's worthwhile to take a minute and look at the text of article VI. It provides:

> *Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.*

The obligations in article VI apply to all states, not only to nuclear-weapon states. Article VI does not establish any specific timelines for the fulfillment of the obligations it states. The only reference to timing in the text is very general—that is, that negotiations relating to "cessation of the nuclear arms race" are to achieve that goal "at an early date." And indeed, the nuclear arms race between the United States and Russia has in fact ended.

So we are left with the remainder of the obligations under article VI, namely to pursue negotiations in good faith on effective measures relating to *nuclear disarmament* and on a *Treaty on general and complete disarmament under strict and effective international control*. With regard to the nuclear disarmament obligation, the article does not require the consummation of a treaty or agreement for its fulfillment. Rather, it requires the pursuit of negotiations in good faith on effective measures, without reference to any specific measures or any specific requirement that a result be achieved. Indeed, proposals to incorporate specific nuclear disarmament measures into the NPT were floated but not adopted during its negotiation.

Even more to the point—and of direct relevance to the advisory opinion—article VI creates a clear linkage between the nuclear disarmament obligation and the general and complete disarmament obligation. Nuclear disarmament would logically be an element of general and complete disarmament, and this linkage is reflected in the text of article VI. The penultimate preambular paragraph in the NPT further underscores this linkage, citing a number of specific nuclear disarmament measures—cessation of manufacture, stockpile liquidation, elimination of arsenals—that would be "pursuant to a Treaty on general and complete disarmament under

18-Cummins-Chap18.indd 1258 10/22/07 11:50:38 PM

strict and effective international control." The negotiating history of the NPT further supports the view that efforts toward nuclear disarmament would be linked with efforts toward general and complete disarmament.

Although the issue of disarmament obligations was outside the scope of the question the General Assembly posed, the Court nonetheless opined that the NPT article VI obligation is "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." In my view, the Court failed to recognize and give due weight to the linkage between the nuclear disarmament obligation and the general and complete disarmament obligation. Regretfully, it is hard to see much global progress toward general and complete disarmament, and the pursuit of negotiations towards that goal by all states parties is integrally tied to the requirement for the pursuit of negotiations on nuclear disarmament by nuclear-weapon states.

The Court opined that the obligation is to "achieve a precise result . . . by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." While an obligation to pursue negotiations in good faith toward a particular result includes a duty to make all reasonable efforts to reach that result through the negotiating process, the Court did not suggest any timetable or negotiating forum for reaching it. Nor did it find what would constitute "effective measures" and "strict and effective international control" as those terms are used in article VI. In this light, I must say I find the Court's conclusion that article VI contains an "obligation of result" to be puzzling. The Court's opinion doesn't provide any reasoning to support this conclusion and the plain language of article VI doesn't call for a result, but rather calls for good faith pursuit of negotiations. And that is all that any states in the international community could promise. Any treaty on general and complete disarmament could in fact only be elaborated through the detailed negotiation of complex issues concerning the phasing of reductions, elimination of stocks, verification and compliance procedures, and so forth.

Obviously, there is no current negotiation of a treaty on general and complete disarmament. But, the United States has nonetheless

continued to press forward, on the one hand, to pursue rigorous nuclear non-proliferation goals, and, on the other hand, to negotiate and implement nuclear arms control agreements.

2000 NPT REVIEW CONFERENCE

Before turning to the record of the United States in meeting its nuclear obligations under international law, I would like to discuss briefly one document that does not state international law obligations. Some individuals . . . have taken the view that the Final Document of the 2000 NPT Review Conference forms part of the international law relating to nuclear weapons. They point to the thirteen practical steps detailed in the 2000 Final Document, which by their terms state they are intended "for the systematic and progressive efforts to implement article VI" of the NPT. However, as this description implies, the steps identified in the 2000 Final Document cannot be considered to contain legal obligations.

The Vienna Convention on the Law of Treaties states that treaty interpretation looks to "the ordinary meaning" of the treaty terms "in their context and in the light of its object and purpose." The Vienna Convention further notes that, in determining the context of the treaty, we may take into account: (1) "any subsequent agreement between the parties regarding interpretation of the treaty"; or (2) "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." But the thirteen steps in the 2000 Final Document cannot legitimately be viewed as constituting either a "subsequent agreement" or "subsequent practice" for purposes of implementing article VI.

First, the 2000 Final Document did not describe the thirteen steps as an agreement on the meaning of article VI—and surely the States Parties to the NPT would have insisted on such clarity if they had intended that these steps would constitute legally binding interpretations of the obligations under article VI. The United States certainly would have. On the contrary, the 2000 Final Document describes the thirteen steps as "practical steps" for the "systematic and progressive efforts to implement article VI"; nowhere do they purport to interpret the meaning of article VI.

Moreover, the form and language of the 2000 Final Document confirm that it is a report, not an additional agreement between States Parties to the NPT. It represents consensus among the participants in the Review Conference on a list of "practical steps" for implementing article VI. It does not contain any language suggesting the participants have entered into a legally binding commitment under international law to achieve these steps. As for the steps themselves, many are stated in terms that are so general and aspirational that they clearly could not be interpreted as legally binding. To cite just a few examples, the Final Document lists:

- "the importance and urgency of signatures and ratifications" of the Comprehensive Nuclear Test Ban Treaty (CTBT);
- "the necessity of negotiations" on a fissile material cutoff treaty (FMCT);
- "the principle of irreversibility";
- "the further development" of verification capabilities.

Such language does not establish standards against which any particular State Party to the NPT could be judged. Rather, it sets forth objectives of NPT parties as a whole. Any failure to achieve one of the steps would be a collective failure, not an instance of "noncompliance" by any particular state. A key characteristic of legally binding undertakings is that they set standards against which compliance can be judged. The thirteen steps fail to do this.

Although the Review Conference final documents are important political statements, the measures recommended in those documents are not in and of themselves legally binding on any of the NPT states parties and a failure to implement one or more of them could not as a legal matter constitute noncompliance with the NPT. That said, the United States has a solid record in pursuing many of the steps identified in the 2000 Final Document, and in a moment I will review some of the U.S. accomplishments in that regard.

U.S. RECORD: USE OR THREAT OF NUCLEAR WEAPONS

So, what is the U.S. record of compliance with international law on nuclear weapons?

Thankfully, not since World War II has the United States used or threatened the use of nuclear weapons. The United States has always maintained that the law of armed conflict, as well as principles relating to the inherent right of all states to self-defense, govern any use of nuclear weapons. In the absence of any threat or use of nuclear weapons, of course there is no issue of noncompliance with the relevant provisions of the UN Charter or the law of armed conflict by the United States.

The United States also acknowledges that specific treaty obligations relating to the use of nuclear weapons apply. As the advisory opinion noted, in Additional Protocol II to the Treaty of Tlatelolco, the United States and other nuclear weapon states undertook "not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America." The security assurance given by the United States was accompanied by a declaration, noting:

> *That as regards the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties, the United States Government would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Parties' corresponding obligations under Article I of the Treaty.*

This means that the United States would not be bound by its undertaking in the event that a Contracting Party were assisted by or in alliance with a nuclear weapon state.[1]

In addition to the legally binding assurances in the protocol to the Treaty of Tlatelolco, the United States has joined with other nuclear weapon states in providing similar assurances to all non-nuclear weapons states parties to the NPT that are not legally binding, for example those memorialized in UN Security Council Resolution 255 of 1968. The United States has fully complied with both its binding and non-binding security assurances in this area.

---

[1] *See* Jonathan Schwartz, Controlling Nuclear Proliferation: Legal Strategies of the United States, 20 Law and Policy in Int'1 Bus. 1, 10 (1988).

The long-standing policy of nuclear deterrence clearly does not violate international law any more than the maintenance of a standing army does. The Court declined to opine on the general policy of deterrence, but its conclusions that the use of nuclear weapons is not prohibited by any rule of treaty or customary international law, and may not be unlawful in some circumstances, necessarily leads to the conclusion that, for those states that are not bound by Article II of the NPT, it cannot be unlawful to merely possess nuclear weapons and have the technical and military ability to use them, if and when circumstances warranting their use were to arise. Treaties like the NPT explicitly recognize the possession of nuclear weapons by certain states, and others like the CTBT and the proposed FMCT do so implicitly. Thus, while there is an obligation to pursue negotiations in good faith toward nuclear disarmament (in the context of general and complete disarmament), nothing in customary international law makes possession of nuclear weapons or nuclear deterrence unlawful for states not bound by Article II of the NPT. Consequently, there is no issue of U.S. noncompliance here.

U.S. RECORD: DISARMAMENT

So, I regard the United States as being in compliance with its international legal obligations on the threat or use of nuclear weapons. That, too, unsurprisingly, is the view of the U.S. Government. Having said this, I will turn to the question of U.S. compliance with our disarmament obligations under article VI of the NPT. The United States record on its commitments to nuclear disarmament is strong. The measures the United States has undertaken unilaterally, bilaterally and multilaterally are impressive. A May 2005 statement by Ambassador Jackie Sanders, made at the 2005 NPT Review Conference, on "U.S. Implementation of Article VI and the Future of Nuclear Disarmament," outlines these measures. This and other relevant statements are available on the Department of State website. Nevertheless, I will take a few moments to mention some of the important steps taken by the United States:

- under the Strategic Arms Reduction Treaty, or START, a treaty with Russia and three other states of the former Soviet Union, the United States reduced its deployed strategic nuclear weapons by more than 4,000 by 2001;

- since 1988, the United States has dismantled over 13,000 weapons and removed over 200 tons of fissile material from its military stockpile (enough for 8,000+ weapons);
- under the 2002 Moscow Treaty with the Russian Federation, the United States has undertaken to further reduce its numbers of operationally deployed strategic nuclear weapons to between 1,700 and 2,200 by 2012;
- The United States has not conducted any nuclear weapons tests since 1992, in accordance with its unilateral moratorium on testing;
- The United States has not produced fissile material for use in nuclear weapons since 1988; in addition, we have tabled a draft text for a Fissile Material Cut-Off Treaty in the Conference on Disarmament;
- The United States has eliminated nearly 90% of U. S. nonstrategic nuclear weapons and reduced the number of types of nuclear systems in Europe from five in 1991 to just one today;
- The United States has deactivated all 50 Peacekeeper ICBMs, its most modern ICBM, removing a total of 500 nuclear warheads from deployed status;
- The United States has removed four ballistic missile submarines from strategic service, removing hundreds more nuclear warheads from deployed status;
- Together with the Russian Federation, the United States has eliminated under the terms of the HEU Agreement more than 260 metric tons of high-enriched uranium—equivalent to more than 10,000 warheads; and,
- The United States has committed, with the Russian Federation, to eliminate 68 metric tons (34 metric tons each) of weapons-grade plutonium excess to defense needs.

As this suggests, we have come a very long way since the framing of article VI of the NPT. While we understand that many nations would want to hasten the pace of nuclear disarmament, I must reiterate that this is an obligation of all Parties to the NPT, not just the United States. It is clear that the United States is doing its share—indeed more than its share—here. And equally important,

nuclear disarmament is an obligation explicitly linked to the twin objective of general and complete disarmament. Given the current state of the world in that regard, and in particular the continuing pursuit of nuclear weapons by some countries (including some in violation of their NPT obligations), the steps taken by the United States to implement its obligations under article VI have been quite robust.

2. Country-Specific Issues

a. Democratic People's Republic of Korea

(1) Launch of ballistic missiles

On July 15, 2006, the UN Security Council unanimously adopted Resolution 1695 condemning the Democratic People's Republic of Korea ("DPRK" or "North Korea") for its launching of seven ballistic missiles on July 5. In the resolution the Security Council, "[a]ffirming that such launches jeopardize peace, stability and security in the region and beyond, particularly in light of the DPRK's claim that it has developed nuclear weapons, [and] [a]cting under its special responsibility for the maintenance of international peace and security . . . [d]emand[ed] that the DPRK suspend all activities related to its ballistic missile programme . . . [and] require[d] all Member States in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programmes; . . . the procurement of missiles or missile related-items, materials, goods and technology from the DPRK, and the transfer of any financial resources in relation to DPRK's missile or WMD programmes. . . ." The Security Council also "[s]trongly urge[d] the DPRK to return immediately to the Six-Party Talks*

* Editor's note: The Six-Party talks are discussed in a. (4) below.

without precondition, [and] to work towards the expeditious implementation of [the] 19 September 2005 Joint Statement, in particular to abandon all nuclear weapons and existing nuclear programmes, and to return at an early date to the Treaty on Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency safeguards. . . ."

Ambassador John Bolton, U.S. Permanent Representative to the United Nations, commented as follows on the unanimous adoption of Resolution 1695. The full text of Mr. Bolton's remarks is available at *www.state.gov/p/io/rls/rm/69102.htm*.

Eleven days have passed since the Democratic People's Republic of Korea (D.P.R.K.) brazenly defied the international community and fired seven ballistic missiles, including a Taepo-dong 2 intercontinental ballistic missile, into the waters surrounding its neighbors, notably Japan. Despite intense diplomatic efforts by a number of countries prior to these launches, North Korea chose to recklessly disregard the collective will of its neighbors, indeed the world. In so doing, it violated several international commitments it had entered into, most recently the Joint Statement of the Six-Party Talks from September 2005.

. . . When North Korea launched a missile over Japan in 1998, we were not aware at that time that Pyongyang was pursuing a covert uranium enrichment program in violation of the 1994 Agreed Framework. In the intervening eight years, North Korea has withdrawn from the Nuclear Nonproliferation Treaty (NPT), kicked out inspectors of the International Atomic Energy Agency, and declared not just that it is pursuing a nuclear weapons capability, but that it already possesses them.

. . . The launching of seven ballistic missiles by North Korea constitutes a direct threat to international peace and security and demands a strong statement from the Council in the form of a strong Resolution. The past eleven days have witnessed a flurry of diplomatic activity here in New York, a number of capitals around the world, and notably in Pyongyang itself, where a high-level delegation from the People's Republic of China made one last attempt to make the North Korean leadership see reason.

It was appropriate for us to show this flexibility on timing and allow diplomatic efforts a chance to succeed. Those efforts are now exhausted, though, and the continued intransigence and defiance of the North Korean leadership demands a strong response from this Council. The Resolution before us today does just that. . . .

In condemning the multiple launches of these ballistic missiles, the Council is affirming in this Resolution that these launches threaten international peace and security. It is not just launching of these missiles that poses a threat, but the propensity of North Korea to proliferate this technology. North Korea is the world's leading proliferator of ballistic missile technology, so it was entirely appropriate for this Council to reaffirm Resolution 1540, which states that, "the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace security."

This Resolution also demands action. It sends an unequivocal, unambiguous and unanimous message to Pyongyang: suspend your ballistic missile program; stop your procurement of materials related to weapons of mass destruction, and implement your September, 2005 commitment to verifiably dismantle your nuclear weapons and existing nuclear programs. It is not just Pyongyang, though, that must act. It also "requires" Member States to do what they can to prevent the transfer of resources to the D.P.R.K. missile program or the procurement of missile-related items from the D.P.R.K. The United States expects that the D.P.R.K. and all other UN Member States will immediately act in accordance with the requirements of this resolution passed by the Security Council.

This is the first UNSC resolution on North Korea since 1993, reflecting the gravity of this situation and the unity and determination of the Council. We hope this Resolution will demonstrate to North Korea that the best way to improve the livelihood of its people and end its international isolation is to stop playing games of brinkmanship and restore its missile moratorium, return to the Six-Party Talks and implement the terms of the Joint Statement from the last round of those talks.

We look forward to North Korea's full, unconditional and immediate compliance with this Security Council Resolution. We hope that North Korea makes the strategic decision that the pursuit of WMD programs and threatening acts like these missile

launches, make it less, not more secure. We need to be prepared, though, that North Korea might choose a different path. This is why it is important that if the D.P.R.K. does not comply with the requirements of this Resolution, the United States and other Member States have the opportunity at any point to return to the Council for further action.

(2) Nuclear test

On October 9, 2006, the DPRK announced that it had conducted a nuclear test. On October 14, 2006, the UN Security Council adopted Resolution 1718 imposing sanctions on the DPRK, "acting under Chapter VII of the [UN] Charter . . . and taking measures under its Article 41." The measures included financial sanctions and a travel ban on persons related to the nuclear-weapon programme. Resolution 1718 also placed three demands on the DPRK: (1) that it "not conduct any further nuclear test or launch of a ballistic missile"; (2) that it "retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons" ("NPT"); and (3) that it "return to the [NPT] and IAEA safeguards." The resolution also stated that "further decisions will be required, should additional measures be necessary."

In a statement to the Security Council at the time of the resolution's adoption, Ambassador Bolton summarized the resolution's provisions and provided the views of the United States. Ambassador Bolton's remarks are excerpted below and are available at *www.state.gov/p/eap/rls/ot/74013.htm*.

We welcome the unanimous adoption of Resolution 1718. The proclaimed test of a nuclear device by the Democratic People's Republic of Korea unquestionably poses one of the gravest threats to international peace and security that this Council has ever had to confront. Today, we are sending a strong and clear message to North Korea and other would-be proliferators that there will be serious repercussions in continuing to pursue weapons of mass destruction.

Three months ago, this Council sent an unequivocal and unambiguous message to the DPRK: 1) suspend your ballistic missile program; 2) stop your procurement of materials related to weapons of mass destruction; and 3) verifiably dismantle your nuclear weapons and existing nuclear programs. Security Council Resolution 1695 also demonstrated to North Korea that the best way to improve the livelihood of its people and end its international isolation is to stop playing games of brinkmanship, comply with the demands of the Security Council, return to the Six-Party Talks, and implement the terms of the Joint Statement from the last round of those talks.

Sadly, the regime in Pyongyang chose a disturbingly different path. It answered the Security Council's demands with yet another direct threat to international peace and security, proclaiming to the world that it has conducted a successful nuclear weapons test. And with its actions, the North Korean regime has once again broken its word, provoked an international crisis, and denied its people the opportunity for a better life.

* * * *

This resolution demands action. Acting under Chapter VII, it has imposed punitive sanctions on Kim Jong Il's regime. It has broad provisions deciding that Member States shall not engage in any trade with the DPRK not only for items which could contribute to their nuclear weapons and other WMD programs, but for high-end military equipment as well. The United States will rely on a number of control lists already in place as a baseline to implement the decision by the Security Council to ban trade with North Korea in WMD-related materials including lists published by the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group. To further this goal, this Resolution also prevents the travel of government officials of the DPRK known to be involved in their WMD efforts.

This resolution also targets other illicit activities of the regime in Pyongyang, and includes a ban on trade in luxury goods. It targets the way Kim Jong Il finances his weapons of mass destruction programs through criminal activities like money laundering, counterfeiting, and selling of narcotics. It imposes a binding

requirement on all member states to take action against those activities and freeze the assets of entities and individuals of the DPRK involved. The resolution also provides for a regime of inspections to ensure compliance with its provisions, building on the existing work of the Proliferation Security Initiative.

The resolution imposes other strict demands on the DPRK. It requires Pyongyang not to conduct any further nuclear test or launch of a ballistic missile. It demands that North Korea abandon all of its WMD programs, including nuclear, chemical, and biological weapons programs in a complete, verifiable and irreversible manner.

It is our understanding that the DPRK's full compliance with this resolution and the successful resumption of the Six-Party talks would lead to the Council acting to lift the measures imposed by this Resolution. At the same time, we need to be prepared if North Korea again decides to ignore the Security Council, and continue its pursuit of WMD and the means to deliver them. This is why it is important that the United States and other Member States have the opportunity at any point in time to strengthen measures against North Korea and return to the Council for further action.

* * * *

Let me end with a final point. This resolution provides a carve-out for humanitarian relief efforts in North Korea. The reason is clear: the concern of the Security Council is with the regime in Pyongyang, not the starving and suffering people of North Korea. We hope that North Korea implements and complies fully with the provisions of this Resolution, in the hope that its people can have a brighter future.

Also on October 14, President Bush issued a statement, concluding: "If the leader of North Korea were to verifiably end his weapons programs, the United States and other nations would be willing to help the nation recover economically." The full text of the President's statement is available at 42 WEEKLY COMP. PRES.DOC. 1767 (Oct.16, 2006).

(3) U.S. sanctions

On December 7, 2006, President Bush issued Presidential Determination No. 2007-7, stating:

> In accordance with section 102(b) (1) of the Arms Export Control Act and section 129 of the Atomic Energy Act, I hereby determine that North Korea, a non-nuclear-weapon state, detonated a nuclear explosive device on October 9, 2006. The relevant agencies and instrumentalities of the United States Government are hereby directed to take the necessary actions to impose on North Korea the sanctions described in section 102(b) (2) of the Arms Export Control Act, as amended (22 U.S.C. 2799aa-1), and section 129 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2158).

72 Fed. Reg. 1899 (Jan. 16, 2007).

(4) Six-party talks

As noted above, Security Council Resolution 1718 called on the DPRK to return to the six-party talks among the DPRK, Japan, the People's Republic of China, the Republic of Korea, the Russian Federation, and the United States, and to work toward "expeditious implementation of the Joint Statement issued on 19 September 2005." The talks and the Joint Statement are discussed in *Digest 2005* at 1067-73; *see also Digest 2004* at 1149-55.

On October 31, 2006, President Bush announced the renewal of the talks, stating:

> Today . . . [t]here is an agreement to restart the six-party talks concerning North Korea. . . .
>
> . . . I thank the Chinese, the South Koreans, the Japanese, and the Russians for agreeing to come back to the table with North Korea. We'll be sending teams to the region to work with our partners to make sure that

> the current United Nations Security Council resolution is enforced, but also to make sure that the talks are effective; that we achieve the results we want, which is a North Korea that abandons their nuclear weapons programs, and . . . nuclear weapons, in a verifiable fashion in return for a better way forward for her people.
>
> . . . I [also] want to . . . assure the American people we'll continue to work to resolve this in a peaceful way.

The full text of the President's statement is available at 42 WEEKLY COMP. PRES. DOC. 1937 (Nov.7,2006); *see also* press conference of the same date at U.S. Embassy, Beijing, with Christopher Hill, Assistant Secretary of State for East Asian and Pacific Affairs, available at *www.state.gov/p/eap/rls/rm/75394.htm*.

The six-party talks resumed in Beijing on December 18, 2006.

b. Iran

(1) IAEA report to the Security Council

On February 4, 2006, the Board of Governors of the UN International Atomic Energy Agency ("IAEA") adopted a resolution requesting IAEA Director General Mohamed ElBaradei "to report to the Security Council . . . that [certain] steps are required of Iran by the Board and to report to the Security Council all IAEA reports and resolutions, as adopted, relating to this issue." IAEA Doc. GOV/2006/14, available at *www.iaea.org/Publications/Documents/Board/2006/gov2006-14.pdf*. Paragraph 1 provided that the Board:

> *Underlines* that outstanding questions can best be resolved and confidence built in the exclusively peaceful nature of Iran's programme by Iran responding positively to the calls for confidence building measures which the

Board has made on Iran, and in this context *deems* it necessary for Iran to:

- re-establish full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the Agency;
- reconsider the construction of a research reactor moderated by heavy water;
- ratify promptly and implement in full the Additional Protocol;
- pending ratification, continue to act in accordance with the provisions of the Additional Protocol which Iran signed on 18 December 2003;
- implement transparency measures, as requested by the Director General, including in GOV/2005/67, which extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol, and include such access to individuals, documentation relating to procurement, dual use equipment, certain military-owned workshops and research and development as the Agency may request in support of its ongoing investigations;

The Director General's report to the President of the Security Council by letter of February 4, 2006, with enclosures, was circulated under cover letter from Secretary General Annan, U.N. Doc. S/2006/80, available at *http://documents.un.org*. On the same date, President Bush issued a statement welcoming the IAEA action, excerpted below and available at 42 WEEKLY COMP. PRES. DOC. 193 (Feb. 13, 2006).

---

* * * *

The Security Council will now address the IAEA Board's finding of "Iran's many failures and breaches of its obligations to comply" with its Nuclear Nonproliferation Treaty Safeguards Agreement. We expect the Security Council to add its weight to the IAEA

Board's calls for the Iranian regime to: return to the Paris Agreement suspending all enrichment and reprocessing activity; cooperate fully with the IAEA; and return to negotiations with the EU-3 of Great Britain, France, and Germany. Those steps are necessary for the regime to begin to restore any confidence that it is not seeking nuclear weapons under the cover of a civilian program.

Today's vote by the IAEA Board is not the end of diplomacy or the IAEA's role. Instead, it is the beginning of an intensified diplomatic effort to prevent the Iranian regime from developing nuclear weapons. . . . The regime's continued defiance only further isolates Iran from the rest of the world and undermines the Iranian people's aspirations for a better life.

I end with a message to the Iranian people. The action today by the IAEA Board of Governors is not about denying the Iranian people the benefits of civilian nuclear power. The EU-3 and Russia, with the support of the United States, have made the Iranian regime offers that would enable Iran to have a civil nuclear energy program. The international community's sole purpose in this vote is to prevent the acquisition of nuclear weapons by the regime. Iran's true interests lie in working with the international community to enjoy the benefits of peaceful nuclear energy, not in isolating Iran by continuing to develop the capability to build nuclear weapons.

(2) Security Council and other international actions

On March 29, 2006, the Security Council issued a Presidential Statement calling upon Iran "to take the steps required by the IAEA Board of Governors, notably in the first operative paragraph of its resolution GOV/2006/14, which are essential to build confidence in the exclusively peaceful purpose of its nuclear programme and to resolve outstanding questions, and underlines, in this regard, the particular importance of re-establishing full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA." U.N. Doc. S/PRST/2006/15. Among other things, the letter expressed the Security Council's strong support for the role of the IAEA Board of Governors and concluded with a request from the

Security Council for a report from the Director General of the IAEA in 30 days. The text of the statement is available at *http://documents.un.org.*

In an exchange with reporters on March 29, Ambassador Bolton commented on the Security Council action as excerpted below.

---

* * * *

. . . I think one thing that's very important is that . . . we're sending . . . to the government of Iran that has been pursuing nuclear weapons a very clear message that we want a response from the government of Iran on. And the response we want is full compliance with the obligations it voluntarily undertook in the Non-Proliferation Treaty, the obligations it undertook in its safeguards agreement with the IAEA and the nearly dozen IAEA resolutions that have been adopted. So there's no ambiguity in what we're waiting for here—we're waiting for the Iranians to do what they themselves have said they were going to do and violated and the obligations that they undertook by being a member of the IAEA. . . . [W]hat happens [after the 30 days] will be the subject of discussions in Berlin tomorrow when Secretary Rice meets with her counterparts, but they will be having a forward-looking discussion. . . .

* * * *

. . . [W]e want to strengthen the hand of the IAEA, but the Security Council has a separate, independent responsibility under the UN Charter for the maintenance of international peace and security. The actions of the Security Council are not dependent in any way on the actions of any other UN body. The Security Council can and should work with other UN bodies, but if the Iranians take steps as they have repeatedly over the last four years that show a continuing desire to get nuclear weapons . . . this is a test for the Security Council. The threat of the proliferation of weapons of mass destruction and international terrorism are the greatest threats to international peace and security we face in the world today. How the Council handles those threats, will be a determining factor in the role of the Council in the future.

As indicated in Ambassador Bolton's remarks, on March 30, 2006, Secretary of State Condoleezza Rice met with her counterparts from Germany, France, Russia, Great Britain, and China, and the European Union High Representative ("P5+1") in Berlin. In a press meeting hosted by German Foreign Minister Frank-Walter Steinmeier, Secretary Rice stated:

> . . . I think [the Security Council Presidential Statement] does send a very strong signal to Iran that the international community is united and expects Iran to adhere to the just demands of the international community that its nuclear activities be demonstrably for civilian purposes and that there are ways that Iran can have a civil nuclear program. That is not the issue. But it has to be a way that gives confidence to the international community that an Iran [that] for 18 years was not truthful with the IAEA is indeed conducting only civil nuclear activities. And there have been a number of offers to Iran, by the EU-3, by Russia, [on] means to do that, but this is a strong signal to Iran that negotiation, not confrontation, should be their course.

The full text of the P5+1 briefing is available at *www.state.gov/secretary/rm/2006/63864.htm*. *See also* Secretary of State Statement on the Presidential Statement, March 29, 2006, available at *www.state.gov/secretary/rm/2006/63833.htm*.

On July 12, 2006, French Minister for Foreign Affairs Philippe Douste-Blazy released a statement on behalf of Secretary of State Rice and the Ministers for Foreign Affairs of China, France, Germany, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland, and the High Representative of the European Union. The press statement, set forth below, was transmitted to the Security Council in a letter dated July 25, 2006, U.N. Doc. S/2006/573, available at *http://documents.un.org*.

---

* * * *

On 1 June 2006 we met in Vienna and agreed on a set of far-reaching proposals as a basis for negotiation with the Islamic Republic of Iran, stressing however that, should the Islamic Republic of Iran decide not to engage, further steps would have to be taken in the Security Council. This offer was delivered to Tehran on 6 June. It includes offers of cooperation in the political, economic and nuclear areas which would be of significant benefit to the Islamic Republic of Iran.

Today, five weeks later, we have reviewed the situation on the basis of a report by [European Union High Representative] Javier Solana, who met three times with [Secretary of Iran's Supreme National Security Ali] Larijani.

The Iranians have given no indication at all that they are ready to engage seriously on the substance of our proposals. The Islamic Republic of Iran has failed to take the steps needed to allow negotiations to begin, specifically the suspension of all enrichment-related and reprocessing activities, as required by the International Atomic Energy Agency (IAEA). We express profound disappointment at this situation.

In this context, we have no choice but to return to the Security Council and take forward the process that was suspended two months ago.

We have agreed to seek a Security Council resolution that would make the IAEA-required suspension mandatory.

Should the Islamic Republic of Iran refuse to comply, we will work for the adoption of measures under Chapter VII, Article 41, of the Charter of the United Nations.

Should the Islamic Republic of Iran implement the decisions of [the] IAEA and the Security Council and enter into negotiations, we would be ready to hold back from further action in the Security Council.

We urge the Islamic Republic of Iran once again to respond positively to the substantive proposals we made last month.

On July 13, 2006, Jean-Marc de La Sabliére, Permanent Representative of France to the United Nations, transmitted to the Security Council "the proposals of China, France, Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States

of America, with the support of the High Representative of the European Union, for a comprehensive long-term arrangement that would allow for the development of relations and cooperation with the Islamic Republic of Iran, based on mutual respect and the establishment of international confidence in the exclusively peaceful nature of the nuclear programme of the Islamic Republic of Iran." U.N. Doc. S/2006/521, available at *http://documents.un.org*. The proposed elements of a long-term agreement were attached to S/2006/521 as an annex.

On July 31, 2006, the Security Council adopted Resolution 1696 "acting under Article 40 of chapter VII of the Charter of the United Nations in order to make mandatory the suspension required by the IAEA." Paragraph 1 of the resolution "call[ed] upon Iran without further delay to take the steps required by the IAEA Board of Governors in its resolution GOV/2006/14," and paragraph 2 "demand[ed], in this context, that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA."

In paragraphs 4, 8, and 9, the Security Council:

> 4. *Endorse[d]*, . . . the proposals of China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the support of the European Union's High Representative, for a long-term comprehensive arrangement which would allow for the development of relations and cooperation with Iran based on mutual respect and the establishment of international confidence in the exclusively peaceful nature of Iran's nuclear programme (S/2006/521) . . .
>
> * * * *
>
> 8. *Express[ed]* its intention, in the event that Iran has not by [August 31, 2006, the date on which a report from the Director General of the IAEA was requested by the Security Council] complied with this resolution, then to adopt appropriate measures under Article 41 of

> Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and *underlines* that further decisions will be required should such additional measures be necessary; [and]
>
> 9. *Confirm[ed]* that such additional measures will not be necessary in the event that Iran complies with this resolution; . . .

A statement by Ambassador John Bolton to the Security Council welcoming Resolution 1696 is excerpted below. The full text of the statement is available at *www.un.int/usa/06_193.htm*.

---

* * * *

Four months have passed since the Security Council called upon Iran to fully and verifiably suspend its nuclear programs, and nearly two months have passed since the EU3-plus-three made its generous offer inviting Iran to enter into negotiations and avoid further Security Council Action. . . . Sadly, Iran has consistently and brazenly defied the international community by continuing its pursuit of nuclear weapons, and the continued intransigence and defiance of the Iranian leadership demands a strong response from this Council. The Resolution before us today does just that.

Mr. President, we are pleased the Council has taken clear and firm action in passing this Resolution. The pursuit of nuclear weapons by Iran constitutes a direct threat to international peace and security and demands a clear statement from the Council in the form of a tough Resolution.

This Resolution also demands action. It sends an unequivocal and unambiguous message to Tehran: take the steps required by the IAEA Board of Governors, including full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, and suspend construction of your heavy water reactor. It also calls upon Member States to do what they can to prevent the transfer of resources to Iran's nuclear and missile programs, and Iran should understand that the United States and others will ensure that the financial transactions

associated with its proliferant activities will be impeded as well. The United States expects that Iran and all other UN Member States will immediately act in accordance with the mandatory obligations of this resolution passed by the Security Council.

* * * *

We look forward to Iran's full, unconditional and immediate compliance with this Resolution. We hope that Iran makes the strategic decision that the pursuit of WMD programs make it less and not more secure. We need to be prepared, however, that Iran might choose a different path. This is why it is important the United States and other Member States have . . . expressed their intention to adopt measures under Article 41 in the event that Iran does not comply with this resolution.

* * * *

In his report of August 31, 2006, Director General ElBaradei stated in conclusion that "Iran has not addressed the long outstanding verification issues or provided the necessary transparency to remove uncertainties associated with some of its activities. Iran has not suspended its enrichment related activities; nor has Iran acted in accordance with the provisions of the Additional Protocol." IAEA Doc. GOV/2006/53, available in full at *www.iaea.org/Publications/Documents/Board/2006/gov2006-53.pdf.** A subsequent report dated November 14, 2006, confirmed that Iran was still not in compliance with Resolution 1696. IAEA Doc.GOV/2006/64, available at *www.iaea.org/Publications/Documents/Board/2006/gov2006-64.pdf.*

On December 23, 2006, the Security Council, "[a]cting under Article 41 of Chapter VII of the UN Charter," adopted

* Following the August 31 report, the Department of the Treasury, Office of Foreign Assets Control, amended the Iranian Transactions Regulations ("ITR") "to cut off Bank Saderat, one of the largest Iranian government-owned banks, from the U.S. financial system," effective September 8, 2006. 71 Fed. Reg. 53,569 (Sept. 12, 2006). *See* Chapter 16.A.4.

18-Cummins-Chap18.indd 1280 10/22/07 11:50:41 PM

Resolution 1737 in which it "[a]ffirmed that Iran shall without further delay take the steps required by the IAEA Board of Governors in its resolution GOV/1006/14," including suspension of "the following proliferation sensitive nuclear activities:

> (a) all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA; and
>
> (b) work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water, also to be verified by the IAEA."

In Resolution 1737, the Security Council imposed sanctions on Iran, described in Ambassador Wolff's statement to the Security Council, excerpted below. It requested a report from the Director General of the IAEA within 60 days concerning suspension of all activities and other compliance, and in paragraph 24, affirmed that it would review Iran's actions in light of the report and:

> (a) that it shall suspend the implementation of measures if and for so long as Iran suspends all enrichment-related and reprocessing activities, including research and development, as verified by the IAEA, to allow for negotiations;
>
> (b) that it shall terminate the measures specified in paragraphs 3, 4, 5, 6, 7, 10 and 12 of this resolution as soon as it determines that Iran has fully complied with its obligations under the relevant resolutions of the Security Council and met the requirements of the IAEA Board of Governors, as confirmed by the IAEA Board;
>
> (c) that it shall, in the event that the report [of the Director General] shows that Iran has not complied with this resolution, adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary . . .

U.N. Doc. S/RES/1737.

In a statement to the Security Council on the adoption of the resolution, Ambassador Alejandro Wolff, U.S. Permanent Representative to the United Nations, provided the explanation of the U.S. vote, as excerpted below. The full text is available at *www.state.gov/p/io/rls/rm/78250.htm*. Also on December 23, Secretary of State Rice "call[ed] on all countries to take immediate action to implement their obligations under this resolution." The full text of the statement is available at *www.state.gov/secretary/rm/2006/78245.htm*.

Iran's pursuit of a nuclear weapons capability constitutes a grave threat and demands a clear statement from the Security Council. Today, we are placing Iran in the small category of states under Security Council sanctions, and sending Iran an unambiguous message that there are serious repercussions to its continued disregard of its obligations and defiance of this important body.

* * * *

This Chapter VII resolution requires Iran to suspend all enrichment-related and reprocessing activities, including research and development, and to stop work on all heavy water related projects, including construction of a heavy water research reactor. This suspension is subject to IAEA verification; a report from the IAEA Director General on the status of this suspension is due to the Council within sixty days. Iran is also required to provide the IAEA the access it needs to verify suspension and resolve outstanding issues. Finally, the IAEA calls on Iran to ratify the Additional Protocol.

In order to persuade Iran to take these steps, the resolution imposes sanctions on elements of the Iranian regime involved in dangerous proliferation activities. It decides that Member States shall not engage in trade with Iran in three key nuclear areas: enrichment, reprocessing, and heavy water projects, and it prohibits its Member States from engaging in any trade with Iran that could contribute to its development of a nuclear weapon delivery system. Similarly, the resolution prohibits Iran from exporting a range of proliferation sensitive technologies or related equipment.

18-Cummins-Chap18.indd 1282 10/22/07 11:50:41 PM

This resolution prohibits any technical or financial assistance related to the transfer or use of the prohibited items to other countries. It requires States to freeze the assets of identified individuals and entities involved in Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, and calls on States not to allow international travel by these individuals. The IAEA is also required to stop providing technical cooperation for such activities.

The United States expects that Iran, and all other UN Member States, will immediately act, under their Charter obligations, to implement the requirements of this resolution.

This is the second UN Security Council resolution under Chapter VII on Iran in response to its efforts to obtain a nuclear weapons capability, reflecting the gravity of this situation and the determination of the Council. We hope this resolution will convince Iran that the best way to ensure its security and end its international isolation is to abandon the pursuit of nuclear weapons and take the steps needed to restore international confidence.

In this resolution the Council has clearly affirmed its intention to review Iran's actions based on the IAEA report and to adopt further measures if Iran has not complied fully with its obligations. We look forward to Iran's full, unconditional, and immediate compliance with this resolution. Iran's cooperation would pave the way for a negotiated solution. We hope that the Iranian leadership comes to understand that the pursuit of a nuclear weapons capability makes it less, not more, secure.

In conclusion this resolution provides an important basis for action. It compels all UN Member States to take all measures necessary to deny Iran equipment, technology, technical assistance, and financial assistance that would contribute to Iran's enrichment, reprocessing, heavy water, or nuclear weapon delivery programs. It is clear on this and not open to interpretation. We will insist on absolute adherence to its requirements, but adoption of this resolution is only a first step. In the coming weeks we will work with the Sanctions Committee to ensure this resolution is as effective as possible. We will also take steps under U.S. law to ensure that we have put in place appropriate measures against individuals and entities involved in the Iranian nuclear and missile programs. We call on every other country to urgently follow suit.

Finally, if necessary, we will not hesitate to return to this body for further action if Iran fails to take steps to comply.

* * * *

c. India: Implementation of 2005 India-U.S. Joint Statement[*]

(1) Identifying and separating civilian and military nuclear facilities and programs in India

In March 2006 India established a separation plan in furtherance of its commitment to "identify[] and separat[e] civilian and military nuclear facilities and programmes in a phased manner." In the "Implementation of the India-United States Joint Statement of July 18, 2005: India's Separation Plan," adopted by the Indian Government on March 2, 2006, India committed to "identify and offer for IAEA safeguards 14 thermal power reactors between 2006 and 2014" and to place "all future civilian thermal power reactors and civilian breeder reactors" under such safeguards. The document also noted that the United States had reaffirmed its "assurance to create the necessary conditions for India to have assured and full access to fuel for its reactors." The full text of the separation plan is available at *http://meaindia.nic.in/searchhome.htm*.

(2) U.S. legislation

On December 18, 2006, President Bush signed into law Public Law 109-401, which included as Title I the Henry J. Hyde United States and India Nuclear Cooperation Promotion Act of 2006. The legislation provides certain exceptions and waivers to facilitate nuclear cooperation with India under the Atomic Energy Act and imposes a number of restrictions and reporting requirements related to such nuclear cooperation. At the time the final bill was adopted by the House and Senate,

* The 2005 joint statement is available at 41 WEEKLY COMP. PRES. DOC. 1182 (July 25, 2005); *see Digest 2005* at 1077-89.

Secretary of State Condoleezza Rice welcomed the action, stating that the legislation "explicitly authorizes civil nuclear cooperation with India in a manner fully consistent with the U.S.-India Joint Statements of July 18, 2005 and March 2, 2006." The full text of the Secretary's statement is available at *www.state.gov/secretary/rm/2006/77547.htm*.

A fact sheet released by the Department of State on that date, "U.S.-India Civil Nuclear Cooperation Initiative," described the act and the steps remaining to fully implement the U.S.-India Civil Nuclear Cooperation Initiative, as excerpted below. The full text of the fact sheet is available at *www.state.gov/r/pa/scp/2006/77944.htm*. *See also* fact sheet released by the White House on the same date, available at *www.whitehouse.gov/news/releases/2006/12/20061218-2.html*.

---

* * * *

Enactment of this legislation will facilitate civil nuclear cooperation between the United States and India and further demonstrates our intent to fulfill all of our commitments to India reflected in the Joint Statement of July 18, 2005, and India's Separation Plan of March 7, 2006. This legislation is integral to the enhanced relationship that the United States and India are building to promote energy security, prosperity, democracy, and nonproliferation.

Key features of the legislation include:

- Affirming the importance of having India as a strategic partner of the United States;
- Recognizing India's strong nuclear nonproliferation record;
- Stating that civil nuclear cooperation with India is in the long-term interests of the United States;
- Enhancing the authority of the President to waive the full-scope safeguards requirement for civil nuclear cooperation with a non-Nuclear Weapon State under the Atomic Energy Act of 1954, as well other key provisions of that act;
- Reaffirming U.S. policy to limit the spread of enrichment and reprocessing technology;

- Reiterating the commitment of the United States to the Nuclear Non-Proliferation Treaty; and
- Expressing our desire to work with India to bolster non-proliferation efforts around the world.

* * * *

The U.S.-India Civil Nuclear Cooperation Initiative will achieve important benefits for the people of both countries as well as the international community. It will bring India into the global nuclear nonproliferation mainstream. For the first time, India has committed to take significant nonproliferation steps that will end its 30-year isolation from the global regime. It will deepen the U.S.-India strategic relationship and thus help ensure stability, prosperity, and peace in Asia and worldwide. It will open significant business opportunities for American and international firms to help meet India's demand for civil nuclear technology, fuel, and support services. It will also help meet India's surging energy requirements in an environmentally-friendly manner.

With the completion of the legislation, the United States now looks forward to the rapid completion of the necessary steps to fully implement the Initiative and enable civil nuclear cooperation with India. These steps include:

- Completing negotiations on a U.S.-India agreement for peaceful nuclear cooperation as required under the Atomic Energy Act of 1954 and approval of that agreement by Congress;
- Negotiation of a safeguards agreement between India and the International Atomic Energy Agency applicable to India's separated civil nuclear sector; and
- The achievement of a consensus in the Nuclear Suppliers Group to make an India-specific exception to the full-scope safeguards requirement of the Group's export guidelines.

* * * *

In a statement released at the time he signed the bill into law, President Bush stated that it "will strengthen the strategic relationship between the United States and India and deliver valuable benefits to both nations" and commented as

follows on issues relating to his constitutional powers related to foreign affairs. The full text of the signing statement is available at 42 WEEKLY COMP. PRES. DOC. 2179 (Dec. 25, 2006).

---

* * * *

Section 103 of the Act purports to establish U.S. policy with respect to various international affairs matters. My approval of the Act does not constitute my adoption of the statements of policy as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory. Also, if section 104(d)(2) of the Act were construed to prohibit the executive branch from transferring or approving the transfer of an item to India contrary to Nuclear Suppliers Group transfer guidelines that may be in effect at the time of such future transfer, a serious question would exist as to whether the provision unconstitutionally delegated legislative power to an international body. In order to avoid this constitutional question, the executive branch shall construe section 104(d)(2) as advisory. The executive branch will give sections 103 and 104(d)(2) the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

The executive branch shall construe provisions of the Act that mandate, regulate, or prohibit submission of information to the Congress, an international organization, or the public, such as sections 104, 109, 261, 271, 272, 273, 274, and 275, in a manner consistent with the President's constitutional authority to protect and control information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

d. Russia

On June 19, 2006, the United States and Russia signed a protocol extending for another seven years the U.S.-Russia Cooperative Threat Reduction ("CTR") Umbrella Agreement, first concluded in 1992. Excerpts follow from a statement by

the Department of State Press Secretary of that date, available in full at *www.whitehouse.gov/news/releases/2006/06/20060619-7.htm. See also* 3.d. below

---

. . . CTR programs are a key tool used to deal with one of the gravest threats we face—the danger that terrorists and proliferators could gain access to weapons or materials of mass destruction. Under the CTR programs, thousands of missiles and warheads have been deactivated. The CTR program is also assisting efforts to complete upgrades to Russian nuclear warhead sites in accordance with the Bratislava Nuclear Security Cooperation initiative announced by the President and President Putin last year. By working to secure, eliminate, and account for weapons and materials of mass destruction, CTR programs support the President's National Security Strategy to Combat Weapons of Mass Destruction.

In addition to CTR work in Russia, CTR programs have assisted Kazakhstan, Belarus and Ukraine to become free of nuclear weapons and strategic delivery systems, and helped many states to prevent the proliferation of sensitive materials.

3. Multilateral Efforts

a. Proliferation Security Initiative

On June 23, 2006, the United States participated in a meeting of participants in the Proliferation Security Initiative ("PSI") in Warsaw, Poland. Robert G. Joseph, Under Secretary of State for Arms Control and International Security, addressed the meeting, as excerpted below. The full text is available at *www.state.gov/t/us/rm/68269.htm.*

---

* * * *

Three years ago, in Krakow, President Bush proposed the creation of the Proliferation Security Initiative, bringing together those nations willing to work together to stop the trafficking in weapons of mass destruction and their means of delivery. Today, the

66 nations gathered here in Warsaw, and others that have endorsed the PSI, demonstrate the breadth of that commitment. Our presence sends a strong message to proliferators that we are united in our determination to use our laws, our capabilities, and our political will to ensure that proliferators will not find safe haven within our borders, air space, or territorial waters for their deadly trade.

* * * *

One area for further development is the creation of tools to interdict payments between proliferators and their suppliers. We need to develop additional tools such as denying proliferators access to financing, which my Treasury colleague will discuss in more detail on the next panel. For our part, the United States has put in place a new Executive Order, which prohibits U.S. persons from doing business with entities designated because of their proliferation activities.

* * * *

To further secure increased participation, we will need to dispel any misunderstandings about the PSI Principles. Some countries do not fully understand the flexibility of the Initiative and its complete consistency with national and international legal obligations, particularly when questions of infringement on national sovereignty arise. The partners gathered here understand that each country involved in a PSI interdiction will rely on its own legal authorities, which may be different from another nation's. Governments can look to take action when and where their own laws—as well as international authorities—provide the necessary legal basis. Even though authorities may differ among states, what remains constant is the ability for all states to enforce existing authorities strictly and to develop new laws as needed.

* * * *

b. Fissile material cut-off treaty

On October 10, 2006, Robert L. Luaces, Alternate Representative of the United States to the UN General Assembly First Committee (Disarmament and International

Security), spoke on the importance of adopting a fissile material cut-off treaty. The text of his remarks is provided below (most references to the chairperson deleted) and available at *www.un.int/usa/06_283.htm*. The draft treaty text from May 18, 2006, referred to in Mr. Luaces's remarks, is available at *www.state.gov/s/l/c8183.htm*.

Thank you, Madam Chairman. The United States believes strongly that achieving a legally binding ban on the production of fissile material for use in nuclear weapons is a desirable goal. One way to accomplish this goal would be through the negotiation at the Conference on Disarmament ["CD"] in Geneva of a treaty banning the production of fissile material for use in nuclear weapons or other nuclear explosive devices. We aim to conclude a Fissile Material Cutoff Treaty, or FMCT, as soon as possible.

The United States has given considerable thought to what an FMCT should look like. The draft treaty that we put forward in Geneva on May 18 of this year . . . sets forth the essentials needed for an FMCT that would meet the objective of ending expeditiously the production of fissile material for use in nuclear weapons. The basic obligation under such a treaty, effective at entry into force, would be a ban on the production of fissile material for use in nuclear weapons or other nuclear explosive devices. Stocks of already existing fissile material would be unaffected by the FMCT. The production of fissile material for non-explosive purposes, such as fuel for naval propulsion, also would be unaffected by the treaty.

[T]he definitions set forth in the U.S. draft treaty on "fissile material" and "production" represent the outgrowth of the decade-long international discussion regarding what an FMCT should encompass. We believe that the definitions set forth in that text are appropriate for the purposes of an FMCT without any provision for verification.

The U.S. draft treaty omits verification provisions, consistent with the United States position that so-called "effective verification" of an FMCT cannot be achieved. The ability to determine

compliance with a high level of confidence is a requirement for effective verification. The United States has concluded that, even with extensive verification mechanisms and provisions—so extensive that they could compromise the core national security interests of key signatories, and so costly that many countries would be hesitant to implement them—, we still would not have high confidence in our ability to monitor compliance with an FMCT.

Furthermore, mechanisms and provisions that provide the appearance of effective verification without supplying the reality of effective verification could be more dangerous than having no explicit provisions for verification. Such mechanisms and provisions could provide a false sense of security, encouraging countries to assume that, because such mechanisms and provisions existed, there would be no need for governments themselves—individually or collectively—to be wary and vigilant against possible violations.

[N]egotiating an international ban on the future production of fissile material for nuclear weapons will be [a] difficult enough task, in and of itself. Avoiding time-consuming and, we believe, futile efforts to negotiate so-called "effective" verification measures will expedite action by the CD to conclude a legally binding ban on the production of fissile materials for nuclear weapons or other nuclear explosive devices.

The United States believes that only by focusing on realistic objectives can the CD create the conditions necessary for negotiating an FMCT. The successful negotiation of an FMCT in the CD will be both a significant contribution to the global non-proliferation regime and an example of truly effective multilateralism.

[T]he United States hopes that negotiations in Geneva on an FMCT can begin and conclude in the very near future. We also reiterate our view that, pending the conclusion of a Cutoff Treaty and the entry into force of such a Treaty, all states should declare publicly—and observe—a moratorium on the production of fissile material for use in nuclear weapons, such as the United States has maintained sin[c]e 1988.

c. Multilateral mechanism for reliable access to nuclear fuel

On May 31, 2006, the United States, France, Germany, the Netherlands, the Russian Federation, and the United Kingdom transmitted a communication to the Director General and the Chairman of the Board of Governors of the IAEA, forwarding the "Concept for a Multilateral Mechanism for Reliable Access to Nuclear Fuel. IAEA Doc. GOV/INF/2006/10, available at *www.state.gov/s/l/c8183.htm*. As explained in the cover letter, the concept paper was prepared in response to Director General ElBaradei's urging at the March IAEA Board of Governor's meeting that members develop a "unified approach and begin to move forward" on the issue of nuclear fuel supply assurances.

The introductory paragraph of the concept paper explained the impetus for developing such assurances:

> The possible misuse of sensitive fuel cycle technologies is a serious challenge to the nuclear nonproliferation regime. Assurances of reliable supply of nuclear fuel services are an important element of the solution to this problem. Specifically, a reliable supply mechanism, backed up by reserves of enriched uranium, would support expansion of nuclear energy, taking due account of the needs of developing States, while obviating the need for investment in expensive and sensitive nuclear fuel cycle infrastructure and fostering international cooperation in promoting safe and reliable peaceful use of nuclear energy in accordance with NPT Article IV while minimizing proliferation risks.

The concept's key elements included:

- the establishment of a standing mechanism at the IAEA to facilitate supply in the event commercial supply arrangements are interrupted for reasons other than noncompliance with nonproliferation obligations and cannot be restored through normal commercial processes;

- IAEA determination of eligibility to participate in the mechanism as a recipient, including requirements that a receiving state (1) bring into force a comprehensive safeguards agreement and additional protocol with the Agency and have no outstanding safeguards issues with the Agency, (2) adhere to international safety and security standards, and (3) choose to obtain supplies on the international market and not pursue sensitive fuel cycle activities.
- A commitment by supplier states consistent with their national legal and regulatory requirements, to endeavor to allow export from their territories of enriched uranium and to avoid opposing such exports from other States.

d. Global Initiative to Combat Nuclear Terrorism

On July 15, 2006, the United States and Russia announced the Global Initiative to Combat Nuclear Terrorism. A joint U.S.-Russia statement is excerpted below and available in full at 42 WEEKLY COMP. PRES. DOC. 1345 (July 24, 2006). *See also* joint fact sheet at *www.whitehouse.gov/news/releases/2006/07/20060715-3.html.*

The United States of America and Russia are committed to combating the threat of nuclear terrorism, which is one of the most dangerous international security challenges we face.

Today we announce our decision to launch the Global Initiative to Combat Nuclear Terrorism. Building on our earlier work, the Global Initiative reflects our intention to pursue the necessary steps with all those who share our views to prevent the acquisition, transport, or use by terrorists of nuclear materials and radioactive substances or improvised explosive devices using such materials, as well as hostile actions against nuclear facilities. These objectives are reflected in the International Convention for the Suppression of Acts of Nuclear Terrorism, the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities as amended

in 2005, the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and other international legal frameworks relevant to combating nuclear terrorism.

The United States and Russia call upon like-minded nations to expand and accelerate efforts that develop partnership capacity to combat nuclear terrorism on a determined and systematic basis. Together with other participating countries and interacting closely with the International Atomic Energy Agency (IAEA), we will take steps to improve participants' capabilities to: ensure accounting, control, and physical protection of nuclear material and radioactive substances, as well as security of nuclear facilities; detect and suppress illicit trafficking or other illicit activities involving such materials, especially measures to prevent their acquisition and use by terrorists; respond to and mitigate the consequences of acts of nuclear terrorism; ensure cooperation in the development of technical means to combat nuclear terrorism; ensure that law enforcement takes all possible measures to deny safe haven to terrorists seeking to acquire or use nuclear materials; and strengthen our respective national legal frameworks to ensure the effective prosecution of, and the certainty of punishment for, terrorists and those who facilitate such acts.

We stress that consolidated efforts and cooperation to combat the threat of nuclear terrorism will be carried out in accordance with international law and national legislation. This Global Initiative builds on the International Convention for the Suppression of Acts of Nuclear Terrorism, which Russia and the United States were the first to sign on September 14, 2005. This unique international treaty provides for broad areas of cooperation between states for the purpose of detecting, preventing, suppressing, and investigating acts of nuclear terrorism.

One of our priority objectives remains full implementation by all countries of the provisions of UNSCR 1540, which was adopted in 2004 as a result of joint efforts by the United States and Russia. This resolution is an important non-proliferation instrument aimed at preventing weapons of mass destruction (WMD) from entering "black market" networks and, above all, keeping WMD and related material from falling into the hands of terrorists. The full

implementation by all countries of UNSCR 1373, including the sharing of information pertaining to the suppression of acts of nuclear terrorism and their facilitation, also remains a priority.

We note the importance of IAEA activities in implementing the Convention on the Physical Protection of Nuclear Material and Facilities, as amended and its Plan entitled "Physical Nuclear Security—Measures to Protect Against Nuclear Terrorism," and we reaffirm our willingness to continue supporting and working with the IAEA in this area to enhance the effectiveness of national systems for accounting, control, physical protection of nuclear materials and radioactive substances, and the security of civilian nuclear facilities, and, where necessary, to establish such systems.

* * * *

The United States and the Russian Federation reaffirm that issues related to safeguarding nuclear weapons and other nuclear facilities, installations and materials used for military purposes remain strictly the national prerogative of the nuclear weapons state parties to the Non-Proliferation of Nuclear Weapons Treaty (NPT), for which they bear special responsibility. The Joint Statement on Nuclear Security, which we adopted in Bratislava, noted that while the security of nuclear facilities in the United States and Russian Federation meets current requirements, these requirements must be constantly enhanced to counter evolving terrorist threats. We trust that the other nuclear weapon state parties to the NPT will also ensure a proper level of protection for their nuclear facilities, while taking into account the constantly changing nature of the terrorist threat.

* * * *

On October 31, 2006, representatives of thirteen nations endorsed the Global Initiative to Combat Nuclear Terrorism Statement of Principles at the Initiative's first meeting in Rabat, Morocco. The United States, the Russian Federation, Australia, Canada, China, France, Germany, Italy, Japan, Kazakhstan, Morocco, Turkey, and the United Kingdom participated in the meeting; the International Atomic Energy Agency also attended as an observer. A fact sheet released by the Department of

State on November 7, 2006, is available at *www.state.gov/t/isn/rls/fs/75845.htm*. The text of the statement of principles is available at *www.state.gov/r/pa/prs/ps/2006/75405.htm*.

On September 15, 2006, Department of State Spokesman Sean McCormack announced that the United States and Russia had signed a protocol providing a framework for resolving liability issues to enable cooperation between the two countries to convert 34 metric tons each of excess weapon-grade plutonium, totaling enough for more than 16,000 nuclear weapons, into forms unusable for weapons by terrorists or others. The press statement is available in full at *www.state.gov/r/pa/prs/ps/2006/72291.htm*.

4. Other U.S. Legislative and Regulatory Measures

a. Implementation of U.S. Additional Protocol

As noted in 2.c.(2) above, on December 18, 2006, President Bush signed into law Public Law 109-401. Title II, the United States Additional Protocol Implementation Act, implemented the U.S. Protocol Additional to the Agreement Between the United States and the IAEA for the Application of Safeguards in the United States ("Additional Protocol"). The Senate provided advice and consent to ratification of the protocol on March 26, 2004. *See Digest 2004* at 1118-28 and *Digest 2002* at 1058-60.

Certain principles applicable to U.S. ratification of the Additional Protocol were set forth in paragraphs 8-10 of § 202 of the act, "Findings," as follows:

> (8) Implementation of the Additional Protocol by the United States is not required and is completely voluntary given its status as a nuclear-weapon State Party, but the United States has acceded to the Additional Protocol to demonstrate its commitment to the nuclear nonproliferation regime and to make United States civil nuclear

activities available to the same IAEA inspections as are applied in the case of non-nuclear-weapon State Parties.

(9) In accordance with the national security exclusion contained in Article 1.b of its Additional Protocol, the United States will not allow any inspection activities, nor make any declaration of any information with respect to, locations, information, and activities of direct national security significance to the United States.

(10) Implementation of the Additional Protocol will conform to the principles set forth in the letter of April 30, 2002, from the United States Permanent Representative to the International Atomic Energy Agency and the Vienna Office of the United Nations to the Director General of the International Atomic Energy Agency.

b. Weapons of mass destruction

On October 27, 2006, President Bush renewed the national emergency first declared on November 14, 1994, finding that the proliferation of weapons of mass destruction and their means of delivery "continues to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 71 Fed. Reg. 64,109 (Oct. 31, 2006). The President expanded the sanctions available to combat trafficking in WMD and related materials in 2005 by cutting off finances and other resources that support proliferation networks. Executive Order 13382; *see Digest 2005* at 1125-30.

A current list of all entities designated under Executive Order 13382, including Iranian, Swiss, U.S., and Chinese individuals and entities designated in 2006, is available at *www.state.gov/t/isn/c22080.htm*. Further information is available from the Office of Foreign Assets Control, Department of the Treasury, website at *www.treasury.gov/offices/enforcement/ofac/actions/2006.shtml*.

c. Other sanctions

(1) Iran Nonproliferation Act of 2000 actions

On July 25, 2006, the Department of State determined that measures authorized in § 3 of the Iran Nonproliferation Act of 2000 were to apply to seven named entities from North Korea, Cuba, India, and Russia. 71 Fed. Reg. 44,345 (Aug. 4, 2006). Excerpts follow from the summary and supplementary information section of the Federal Register notice. *See also* 71 Fed. Reg. 69,220 (Nov. 30, 2006) subsequently terminating the sanctions imposed on one of the Russian entities.

---

* * * *

. . . Section 3 of the Iran Nonproliferation Act of 2000, . . . provides for penalties on entities for the transfer to Iran since January 1, 1999, of equipment and technology controlled under multilateral export control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists, but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

* * * *

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;

2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these

persons shall not be eligible to participate in any assistance program of the United States Government;

3. No United States Government sales to the foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and

4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

* * * *

(2) Amendment of Foreign Assets Control Regulations: North Korea

Effective May 8, 2006, the Office of Foreign Assets Control, Department of the Treasury, amended the Foreign Assets Control Regulations "to add a new provision limiting the authorization of post-June 19, 2000 transactions involving property in which [North Korea] or a national thereof has an interest. The new provision prohibits United States persons from owning, leasing, operating or insuring any vessel flagged by North Korea." 71 Fed. Reg. 17,345 (Apr. 6, 2006). The Background section of the Federal Register publication explained as excerpted here.

---

* * * *

The Foreign Assets Control Regulations (the "FACR"), 31 CFR part 500, which are authorized under the Trading with the Enemy Act, 50 U.S.C. App. 1-44, imposed economic sanctions against the Democratic People's Republic of Korea ("North Korea") beginning in 1950. Since that time, those sanctions have been modified on a number of occasions, most recently to ease economic sanctions against North Korea in order to improve overall relations and to encourage North Korea to continue to refrain from testing

long-range missiles. Consistent with U.S. foreign policy interests, the Office of Foreign Assets Control ("OFAC"), on June 19, 2000, amended the FACR, 31 CFR part 500, to add § 500.586, authorizing transactions concerning certain North Korean property.

. . . The effective date of this amendment has been delayed to provide time for United States persons to re-flag any vessels currently flagged by North Korea.

(3) Amendment of Export Administration Regulations: Wassenaar Arrangement

Effective September 7, 2006, the Bureau of Industry and Security, U.S. Department of Commerce, amended the Export Administration Regulations to implement changes to the Wassenaar Arrangement's List of Dual-Use Goods and Technologies and to make other changes. 71 Fed. Reg. 52,956 (Sept. 7, 2006). The Summary section of the final rule explained the action taken as excerpted below.

---

* * * *

The Bureau of Industry and Security (BIS) maintains the Commerce Control List (CCL), which identifies items subject to Department of Commerce export controls. This final rule revises the Export Administration Regulations (EAR) to implement changes made to the Wassenaar Arrangement's List of Dual-Use Goods and Technologies (Wassenaar List), and Statements of Understanding maintained and agreed to by governments participating in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement, or WA.) The Wassenaar Arrangement advocates implementation of effective export controls on strategic items with the objective of improving regional and international security and stability. To accommodate the changes to the Wassenaar List, this rule revises the EAR by amending certain entries that are controlled for national security reasons in Categories 1, 2, 3, 5 Part I

(Telecommunications), 5 Part II (Information Security), 6, 8, and 9, and by amending the EAR Definitions.

The purpose of this final rule is to make the necessary changes to the CCL, definitions of terms used in the EAR, and Wassenaar reporting requirements to implement Wassenaar List revisions that were agreed upon in the December 2005 Wassenaar Arrangement Plenary Meeting. In addition, this rule adds Croatia, Estonia, Latvia, Lithuania, South Africa, and Malta to the list of Wassenaar participating states in the EAR, which brings the total number of participating states to 40.

This rule also adds or expands unilateral U.S. controls and national security controls on certain items to make them consistent with the amendments made to implement the Wassenaar Arrangement's decisions.

* * * *

Cross References

MANPADS-related sanctions, **Chapter 3.B.1.e.(3).**
Children in armed conflict, **Chapter 6.C.3.**
Claims based on violation of proportionality of use of force analysis under ATS and TVPA, **Chapter 6.I.1.e. and 2.a.**
Agent Orange litigation, **Chapter 8.B.2.**
U.S. National Space Policy, **Chapter 12.B.1.**
Arms embargo imposed by Security Council in Israel-Lebanon conflict, **Chapter 17.A.3.**

18-Cummins-Chap18.indd 1302 10/22/07 11:50:44 PM

Table of Cases

** An asterisk denotes cases in fora, including the International Court of Justice, other than U.S. Federal and state courts. Alphabetization is letter-by-letter (e.g., "Sidhu" precedes "Si Lu Tian").*

A
Abdulaziz v. Metropolitan Dade County (1984), 654, 659
Abiola v. Abubakar (2006), 482
Abourezk v. New York Airlines, Inc. (1990), 586
Abourezk v. Reagan (1986), 25
Abrams v. Société Nationale des Chemins de Fer Francais (2004), 78, 85
Abu Ali v. Ashcroft (2004), 1211, 1212*n*
Abu Ali v. Gonzales (2004), 1198*n,* 1207
*ADF Group, Inc. v. United States (2003), 700
Adler v. Federal Republic of Nigeria (1997), 575
Af-Cap v. Republic of Congo (2006), 562, 563, 603–11
Afshari; United States v. (2006), 180
"Agent Orange" Prod. Liab. Litig., In re (2006), 522–26
Air Canada v. U.S. Dep't of Transp. (1988), 661
Aktepe v. United States (1997), 525
Alfred Dunhill of London, Inc. v. Republic of Cuba (1976), 549, 596, 632
Al Hamdi; United States v. (2004), 654, 657
Allied Local & Reg'l Mfrs. Caucus v. EPA (2000), 868
Almendarez-Torres v. United States (1998), 869
Al Najjar v. Ashcroft (2001), 50
Alperin v. Vatican Bank (2005), 434
Altadis USA, Inc. v. Sea Star Line (2006), 919
American Acad. of Religion v. Chertoff (2006), 19–29
American-Arab Anti-Discrimination Comm. v. Reno (1995), 190
American Civil Liberties Union v. Department of Def. (2005), 1213–18
American Coalition for Competitive Trade v. Clinton (1997), 727, 728
American Dredging Co. v. Miller (1994), 965

ILI-Digest-Table&Indx.indd 1303 10/22/07 11:51:46 PM

American Ins. Ass'n v. Garamendi (2003), 454, 520, 732
American Int'l Group, Inc. v. Iran (1981), 1015
American Road Serv. Co. v. Consolidated Rail (2003), 919
The Amiable Isabella (1821), 66
Amstar Corp. v. S/S Alexandros T. (1981), 830
Andrade v. Gonzales (2006), 48
The Apollon (1824), 469
Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc. (1999), 607, 611
Arabian Am. Oil Co.; EEOC v. (1991), 439–40, 455, 469
Arar v. Ashcroft (2006), 484
Arcaya v. Paez (1956), 632
ARC Ecology v. U.S. Dep't of Air Force (2005), 858
Argentina v. City of N.Y. (1969), 596
Argentina v. Weltover, Inc. (1992), 595, 625
Argentine Republic v. Amerada Hess Shipping Corp. (1989), 549, 639*n,* 646
Arlington, County of Va.; United States v. (1982), 661
Arlington, County of Va.; United States v. (1983), 661
Army, Dep't of v. Blue Fox, Inc. (1999), 601
Aronson v. IRS (1992), 1219
*Arrest Warrant of 11 Apr. 2000 (Democratic Republic of the Congo v. Belgium) (2001), 672*n*
Artt, Matter of (1997), 115–17
Artt, Matter of (1998), 115–17
Asociacion de Reclamantes v. United Mexican States (1984), 595, 596
Associated Press v. Department of Def. (2006), 1218–23
Atkins v. Virginia (2002), 366
Atlas Corp. v. United States (1990), 325
Austria v. Altmann (2004), 444, 573, 604
*Avena and other Mexican Nationals (Mexico v. United States) (2004), 70–73, 1023, 1026

B

Baiz, In re (1890), 654, 669
Baker v. Carr (1962), 322–23, 432, 456, 457, 474, 509, 515–17, 520*n,* 523, 524, 524*n,* 526, 543, 544, 674
Baker v. McCollan (1979), 84
Banco Nacional de Cuba v. Sabbatino (1964), 455, 632*n,* 671*n*
Bancoult v. McNamara (2006), 455–59, 541
Bannerman v. Snyder (2003), 84*n*
*Barcelona Traction, Light and Power Co. (Belgium v. Spain) (1970), 501
*Bayview Irrigation Dist. (2007), 697
Belize Telecom, Ltd. v. Belize (2005), 610

Benner; United States v. (1830), 668, 674
Bettis v. Iran (2003), 591
Bikini, People of v. United States (2006), 316–25
Blais v. Iran (2006), 581*n*
*Blaskic; Prosecutor v. (1997), 641
Bloch v. Powell (2003), 1011
Board of Regents v. Roth (1972), 1011
Boos v. Barry (1988), 643
Boumediene v. United States (2006), 1179–83
Bousley v. United States (1998), 69
Bowman v. Chicago N.W. Ry. Co. (1885), 84
Bowsher v. Synar (1986), 733
*Bo Xilai, Re (2005), 672
Bozilov v. Seiffert (1993), 132
BP Prods N. Am., Inc. v. Dagra (2006), 970–73
Braden v. 30th Judicial Circuit Court of Ky. (1973), 1206
Brandenburg v. Ohio (1969), 201, 202, 204
Breard v. Greene (1998), 69, 71, 78, 81, 801, 1023
Brenner v. Shore (1973), 625
The Brig Amy Warwick (1863), 458
Bruno; United States v. (2004), 461
Burns v. Wilson (1953), 1197
Bustillo v. Johnson (2006), 63–75
Byrd v. Corporacion Forestal y Industrial de Olancho SA (1999), 636*n*

C

Cabello v. Fernández Larios (2005), 477
Calandra; United States v. (1974), 67
California v. NRG Energy, Inc. (2004), 552
Campuzano v. Iran (2003), 570
*Canfor Corp. v. United States (2006), 702-709
Capitol Converting Equip. v. LEP Transport (1992), 920
Carrera v. Carrera (1949), 654, 659*n,* 680
Carrion-Caliz; United States v. (1991), 586
Carter v. Greenhow (1885), 84
Central Bank of Denver v. First Interstate Bank of Denver (1994), 446, 447, 448
Chadha; INS v. (1983), 509
Chang v. United States (1988), 1014
Chaparro-Alcantara; United States v. (2000), 85
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. (1984), 182
Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp. (1948), 457, 545
Chong Boon Kim v. Yim Young Shik (1963), 670

Chuidian v. Philippine Nat'l Bank (1990), 630, 636, 636*n,* 637*n,* 638, 646, 652
*Church of Scientology v. Commissioner of the Metropolitan Police (1978), 641
Cicippio-Puleo v. Iran (2004), 589, 590, 592
City of. *See name of city*
Clark v. Martinez (2005), 1189, 1190
Coalition for Fair Lumber Exports v. United States (2006), 726–37
Coleman v. Espy (1993), 611
Coleman v. Thompson (1991), 69
College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (1999), 1011
Columbus-America Discovery Group v. Atlantic Mut. Ins. Co. (1992), 831
Congo, Republic of v. Af-Cap, Inc. (2005), 607
Connecticut Bank of Commerce v. Republic of Congo (2002), 569, 620, 621, 628
Consolidated Edison Co. v. NLRB (1938), 193
Constant; Doe v. (2006), 478
Container Corp. v. Franchise Tax Bd. (1983), 474
Cornejo-Barreto v. Seifert (2000), 150, 152–54
Cornejo-Barreto v. Seifert (2004), 150, 152
Cornejo v. San Diego (2006), 86
Corrie v. Caterpillar, Inc. (2005), 472
Corrie v. Caterpillar, Inc. (pending), 438*n*
Crawford Enters., Inc.; United States v. (1986), 610
Crosby v. National Foreign Trade Council (2000), 454, 474
Curtiss-Wright Exp. Corp.; United States v. (1936), 458, 1179

D

Dabone v. Thornburgh (1990), 28
Da Costa v. Laird (1973), 473, 523, 524, 526
Dames & Moore v. Regan (1981), 733
Dammarell v. Iran (2005), 583, 584, 589, 590, 592
Dataphase Sys. Inc. v. C Sys., Inc. (1981), 959, 960
Dean Witter Reynolds, Inc. v. Fernandez (1984), 1009
*Decision of February 27, 1984 (Tabatabai) (1989), 676
DeLetelier v. Republic of Chile (1984), 569, 605, 639
Dickerson v. United States (2000), 66, 74
District of Columbia v. Gandy (1982), 586
Dluhos v. Floating & Abandoned Vessel (1998), 831
Doe v. *See name of opposing party*
Dole Food Co. v. Patrickson (2003), 554, 555, 557
DRC, Inc., United States ex rel. v. Custer Battles, LLC (2005), 302
DRC, Inc., United States ex rel. v. Custer Battles, LLC (2006), 301–05

Drexel Burnham Lambert v. Committee of Receivers for Galadari (1993), 575
Drummond Co.; Doe v. (2004), 476
Duchow v. United States (1995), 1207
Dunhill of London, Inc. v. Cuba (1976), 508–09

E
E & J Gallo Winery v. Andina Licores, S.A. (2006), 953–58
Earth Island Institute v. Evans (2004), 883
Earth Island Institute v. Gutierrez (2006), 885
East River S.S. Corp. v. Transamerica Delaval, Inc. (1986), 928
EEOC v. *See name of opposing party*
Eisentrager v. Johnson (1950), 1178, 1179, 1181, 1182
Elahi v. Iran (2000), 612
*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy) (1989), 501, 723
El-Fadl v. Central Bank of Jordan (1996), 636*n,* 637, 645
El-Jassem v. United States (1996), 657
El-Masri v. Tenet (2006), 163
El-Shifa Pharm. Indus. Co. v. United States (2004), 525
Empresa Cubana del Tabaco v. General Cigar Co. (2005), 796–801
Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport v. Department of Treasury, Office of Foreign Assets Control (2006), 1006–15
Enahoro v. Abubakar (2005), 443, 482, 571, 636
Enahoro v. Abubakar (2006), 482
Enewetak, People of v. United States (1988), 321
Engle v. Isaac (1982), 72
Englewood, City of v. Socialist People's Libyan Arab Jamahiriya (1985), 602
Erie R.R. Co.; United States v. (1929), 923, 924
*European Parliament v. Commission of the European Communities (2006), 168
*European Parliament v. Council of the European Union (2006), 168
Ex parte. *See name of party*

F
Faniel v. Chesapeake & Potomac Tel. Co. (1979), 586
Ferdinand E. Marcos Human Rights Litig., In re Estate of (1994), 434
Fernandez-Vargas v. Ashcroft (2005), 30
Fernandez-Vargas v. Gonzales (2006), 29–33, 38
FG Hemisphere Assocs., LLC v. Democratic Republic of Congo (2006), 562, 572, 621–26, 658
Field v. Clark (1892), 732
Filartiga v. Pena-Irala (1980), 430, 480, 650, 652

Finanz AG Zurich v. Banco Economico S.A. (1999), 449, 520
First Am. Corp. v. Al-Nahyan (1996), 637
First City, N.A. v. Rafidain Bank (2002), 609, 610
First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (1983), 619, 1009
*Fisheries Jurisdiction Case (Spain v. Canada) (1998), 704
Flatow v. Islamic Republic of Iran (1998), 582
Flick v. Johnson (1949), 1208, 1209
Fok Yung Yo v. United States (1902), 1192
Fong Yue Ting v. United States (1893), 1192
Foti v. City of Menlo Park (1998), 181
Frelinghuysen v. Key (1884), 736
Freund v. France (pending), 504–07

G
Gallina v. Fraser (1960), 158*n*
Garb v. Poland (2002), 573, 574, 576
Garb v. Poland (2006), 558–61, 572
Gau Shan Co. v. Bankers Trust Co. (1992), 961
General Elec. Co. v. Deutz AG (2001), 521
Giordano; United States v. (1974), 66
*Glamis Gold, Ltd. v. United States (2006), 709–26
Glen Cove, City of; United States v. (1971), 596, 597, 661
Global Relief Found., Inc. v. O'Neill (2002), 1014
Goldwater v. Carter (1979), 540
Gonzaga Univ. v. Doe (2002), 77–78, 80, 85
Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (2006), 221–25
Gospel Missions of Am. v. City of Los Angeles (2005), 185
Goss Int'l Corp. v. Man Roland Druckmaschinen AG (2006), 959
Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd. (2006), 958–63
Grand Jury Proceedings, In re (1980), 649
*Grand River Enters. Six Nations, Ltd. v. United States (2006), 688–93
Grayned v. City of Rockford (1972), 181
Great N. Ry. Co. v. Thompson (1963), 923
Greenspan v. Crosbie (1976), 633, 634, 638
Gregoire v. Biddle (1949), 644
Gross v. German Found. Indus. Initiative (2006), 507–17, 524*n*
*Gruslin v. Malaysia (2000), 698
Guaylupo-Moya v. Gonzales (2005), 640

H
Haig v. Agee (1981), 457
Hallock v. Bonner (2004), 573

Hamdan v. Rumsfeld (2005), 84*n*
Hamdan v. Rumsfeld (2006) (Supreme Ct.), 369, 462, 1115, 1138–55, 1160, 1185*n,* 1210
Hamdan v. Rumsfeld (2006) (D.D.C.), 1177–79
Hamdi v. Rumsfeld (2004), 523, 1183, 1198, 1210
Hamid v. Gonzales (2005), 154
Hanil Bank v. Pt. Bank Negara Indonesia (Persero) (1998), 575
Hartford Fire Ins. Co. v. California (1993), 948
Hashemite Kingdom of Jordan v. Layale Enters., S.A. (In re B-727 Aircraft Serial No. 21010) (2001), 563
Hauenstein v. Lynham (1880), 66
Havana Club Holding, S.A. v. Galleon, S.A. (2000), 1009
Head Money Cases (Edye v. Robertson) (1884), 65, 85, 468*n*
Healy v. James (1972), 190
Heaney v. Government of Spain (1971), 633
Hegna v. Islamic Republic of Iran (2003), 660
Hegna v. Islamic Republic of Iran (2004), 617
Hegna v. Islamic Republic of Iran (2005), 615
Heiser v. Iran (2006), 581–84
Hener v. United States (1981), 831*n*
The Henry Ewbank (1833), 833
Hensley v. Municipal Ct. San Jose Milpitas Judicial Dist., Santa Clara County (1973), 1197
Herbage v. Meese (1990), 636, 637, 644, 647
Hernandez-Castillo v. Gonzales (2006), 36–39
Hill v. Republic of Iran (2001), 587
Hilton v. Guyot (1895), 449, 521, 947, 957, 960
Hines v. Davidowitz (1941), 454
Hirota v. General of the Army MacArthur (1948), 1196, 1197, 1198, 1198*n,* 1201, 1202, 1204, 1207, 1208, 1209
Holtzman v. Schlesinger (1973), 473, 523
Holy Land Found. for Relief and Dev. v. Ashcroft (2002), 1014
Holy Land Found. for Relief and Dev. v. Ashcroft (2003), 1012, 1013
Humanitarian Law Project v. Department of Treasury (2006), 183–91
Humanitarian Law Project v. Gonzales (2006), 180–82
Humanitarian Law Project v. Reno (2000), 182, 198
Hwang Geum Joo v. Japan (2005), 456

I

Imbler v. Pachtman (1976), 651
In re. *See name of party*
INS v. *See name of opposing party*
Intel v. Advanced Micro Devices (2004), 966, 967, 968, 969
International Ins. Co. v. Caja Nacional de Ahorro y Seguro (2002), 571

*International Thunderbird Gaming Corp. v. United Mexican States (2006), 713, 714, 723, 724
*Iran, Islamic Republic of; United States v. (Case No. B61, pending), 617–18
Islamic Am. Relief Agency v. Unidentified FBI Agents (2005), 187, 1013, 1014
Ismael John v. United States (2006), 316–25
Israel; Doe v. (2005), 636, 645, 646, 681

J
*Jaffe v. Miller (1993), 641
Japan Line, Ltd. v. County of Los Angeles (1979), 454
Japan Whaling Ass'n v. American Cetacean Soc'y (1986), 322, 456, 508, 540
Jifry v. FAA (2004), 1010
Jogi v. Voges (2005), 75–86
Johnson v. Eisentrager (1950), 1150, 1151, 1180, 1181, 1196, 1209, 1210, 1212
*Jones v. Ministry of Interior (2006), 641, 649
Joo v. Japan (2005), 516, 733
Juda v. United States (1988), 321
Justice, Dep't of v. Reporters Comm. for Freedom of the Press (1989), 1215

K
Kadic v. Karadzic (1995), 445, 485, 516, 650, 652
Kahane Chai v. Department of State (2006), 191–99
Karpova v. Snow (2005), 1017
Kashin v. Kent (2006), 308–11
Kawato, Ex parte (1942), 1178
Keller v. Central Bank of Nigeria (2002), 636*n,* 637
Kelly v. Syria Shell Petroleum Dev. B.V. (2000), 556
Khulamani v. Barclay Nat'l Bank, Ltd. (pending), 476, 477
Kilroy v. Windsor (1978), 670, 677, 678
*King v. Cowle (1759), 1198
Kleindienst v. Mandel (1972), 19*n,* 23, 26
Kline v. Kaneko (1988), 644
Klinghoffer v. S.N.C. Achille Lauro (1991), 588, 589
Kolovrat v. Oregon (1961), 72, 661, 1217*n*
Kostadinov; United States v. (1984), 657
Kuznetsov; United States v. (2006), 653–57
Kwan v. United States (2001), 323

L
Lafontant v. Aristide (1994), 652

*The LaGrand Case (F.R.G. v. United States) (2001), 70–73, 1023
Laker Airways Ltd. v. Sabena, Belgian World Airlines (1984), 961
Landgraf v. USI Film Prods. (1994), 31, 33
Lee; United States v. (1882), 671
Legal Tender Cases (Knox v. Lee) (1870), 1014
Lem Moon Sing v. United States (1895), 1193
Leon; United States v. (1984), 67
Li Weixum v. Bo Xilai (2006), 662–81
Loewen v. United States (2005), 724
*Loewen Group, Inc. v. United States (1998), 501
Lopes v. Lopes (2006), 966–69
Lopez v. Gonzales (2006), 33–36
Lopez; United States v. (2006), 1135
Lowry v. Reagan (1987), 544, 545
L.P. Consulting Group, Inc. v. United States (2005), 325
Lujan v. Defenders of Wildlife (1992), 877
Lyders v. Lund (1929), 632

M
Madsen v. Kinsella (1952), 1209
Magness v. Russian Fed'n (2001), 559, 639*n*
Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. (2006), 963, 964
Malley v. Briggs (1986), 651
Mandowsky v. Dresdner Bank AG (2006), 517–21
Mangste W. El v. New York Passport Agency (2006), 307
Marbury v. Madison (1803), 71, 322, 543, 544
Marcos, Estate of, Human Rights Litig., In re (1996), 605
*Marvin Ray Feldman Karpa (CEMSA) v. United Mexican States (2001), 713, 714, 717, 718
Maryland v. Pringle (2003), 364
Massaro v. United States (2003), 69, 73
Matar v. Dichter (2006), 465–76, 479–82, 629–52
Mathews v. Eldridge (1976), 197
McNeil v. Wisconsin (1991), 73
Medellin, Ex parte (2006), 87–88
Medellin v. Dretke (2004), 72, 81, 86–87
*Metalclad Corp. v. United Mexican States (2000), 696, 717, 723
*Methanex Corp. v. United States (2002), 703, 704, 716
*Methanex Corp. v. United States (2005), 694
Mexico v. Hoffman (1945), 604*n,* 631, 669
Michel v. INS (2000), 681
Microsoft Corp., In re Application of (2006), 969, 970
Milligan, Ex parte (1866), 1141, 1142
Mills v. Alabama (1966), 26

Ministry of Def. v. Elahi (2006), 612–21
Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") v. Cubic Def. Sys., Inc. (2002), 613
Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") v. Cubic Def. Sys., Inc. (2004), 612, 613, 615, 616, 628
Miranda v. Arizona (1966), 74
Mironescu v. Rice (2006), 148–55
Mistretta v. United States (1989), 732, 870
Mohammed v. Harvey (2006), 1194, 1205–13
*Mondev Int'l Ltd. v. United States (2002), 724
Moxon v. The Fanny (1793), 1180
Mujica v. Occidental Petroleum Corp. (2005), 450–55, 944–46
Mujica v. Occidental Petroleum Corp. (pending), 438*n*, 446
Mulligan v. Schultz (1988), 25
Murray v. The Schooner Charming Betsy (1804), 640, 1216*n*
Mwenya, Ex parte (1960), 1207
Myers v. United States (1926), 732

N

*NAFTA Chapter 11/UNCITRAL Cattle Cases, In re (2006), 693–701
*Nahimana; Prosecutor v. (2003), 461
Nai Fook Li; United States v. (2000), 67, 81*n*
National City Bank v. Republic of China (1955), 631
National Council of Resistance of Iran v. Department of State (2001), 195, 197, 198, 1013
National Council of Resistance of Iran v. Department of State (2004), 196
Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa (1987), 947
Natural Res. Def. Council v. EPA (2006), 868
Nazi Era Cases Against German Defendants Litig., In re (2006), 517–21
Neely v. Henkel (1901), 1203, 1212
Neptune Orient Lines v. Burlington N. and Santa Fe (2000), 920
New Rochelle, City of v. Republic of Ghana (1964), 597
New York City v. Baker (1989), 1192
New York City v. Permanent Mission of India (2006), 592, 594–603
Nielsen v. Secretary of Treasury (1970), 1014
Nishimura Ekiu v. United States (1892), 1193
Nitol v. United States (1988), 321
Norfolk S. Ry. Co. v. Kirby (2004), 918, 921, 926, 927, 928
Northern Mariana Islands v. United States (2005), 315–16
Northern Mariana Islands v. United States (2006), 315–16
*North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (1969), 1072

O
O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft (2002), 223
Oetjen v. Central Leather Co. (1918), 457, 522
*Oil Platforms (Iran v. United States) (2003), 703, 704-705, 1023, 1025
*Ojdanić; Prosecutor v. (2006), 260–69
Omar v. Harvey (2006), 1194–1204, 1211*n*
Orange v. District of Columbia (1995), 1011
Owens v. Sudan (2005), 578–81
Owens v. Sudan (2006), 578–81
Oyster Bay Cove, Ltd. Bankr., In re (1994), 601

P
Pakootas v. Teck Cominco Metals, Ltd. (2006), 855–59
Palmer; United States v. (1818), 439–40, 469, 857
Papandreou, In re (1998), 611
Paradissiotis v. United States (2002), 1013, 1014, 1015
Paraguay v. Gilmore (1998), 81
Park v. Shin (2002), 646
Park 'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985), 799
Pauling v. McElroy (1960), 458
PDK Labs., Inc. v. United States DEA (2004), 197
Pennsylvania Bd. of Probation and Parole v. Scott (1988), 67
People of. *See name of country*
People's Mojahedin Org. of Iran v. Department of State (1999), 192, 1009, 1010
People's Mojahedin Org. of Iran v. Department of State (2003), 192, 198
Peroff v. Hylton (1977), 153
Peru, Ex parte (1943), 631, 669, 671, 679
Peter v. United States (1988), 321
Peterson v. Iran (2003), 582, 583
Phaneuf v. Republic of Indonesia (1997), 571
Philippines v. Marcos (1987), 670, 672
Philippines v. Westinghouse Elec. Corp. (1994), 610
Pink; United States v. (1942), 540
Pinkerton; United States v. (1946), 461, 462
Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship (1993), 623
Plaintiffs A, B, C v. Zemin (2003), 670
Ponnapula v. Ashcroft (2004), 39
*Pope & Talbot, Inc. v. Canada (2002), 724
Posada-Carriles v. Campos (2006), 45–50
Posters N' Things, Ltd. v. United States (1994), 181
Powerex Corp. v. California (2006), 550–58
Powerex Corp. v. Reliant Energy Servs. (2006), 550–58

*Power of Municipalities to Levy Rates on Foreign Legations and High Comm'rs' Residences, Re (1943), 597
Powers v. Ohio (1991), 566
Practical Concepts, Inc. v. Republic of Bolivia (1987), 624, 625, 629
Prasoprat v. Benov (2005), 150
Presbyterian Church of Sudan v. Talisman (2006), 460–65
Prevatt v. Iran (2006), 581*n,* 582
Price v. Socialist People's Libyan Arab Jamahiriya (2002), 1008, 1009
Princz v. Federal Republic of Germany (1994), 625, 648, 681
Propper v. Clark (1949), 1014
Prosecutor v. *See name of opposing party*
Pugh v. Socialist People's Libyan Arab Jamahiriya (2006), 590, 591

Q
Qassim v. Bush (2005), 1184
Quackenbush v. Allstate Ins. Co. (1996), 1141
Quirin, Ex parte (1942), 1140, 1141, 1142, 1143, 1144, 1183

R
Rahmani v. United States (2007), 180
Rainwater v. United States (1958), 303–04
Rankine v. Reno (2003), 38–39
Rasul v. Bush (2004), 1178, 1179, 1197, 1210, 1212
Rauscher; United States v. (1886), 1151
Regan v. Wald (1984), 542
Reid v. Covert (1957), 801
Reider v. Thompson (1950), 920, 925
Republic of Poland v. Garb (2004), 573
*Revere Copper & Brass, Inc. v. Overseas Private Invest. Corp. (1978), 716
Rhodes v. Chapman (1981), 83
Richmark Corp. v. Timber Falling Consultants (1992), 610
R.M.S. Titanic v. Haver (Titanic I) (1999), 830, 833
R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel Believed to be the RMS Titanic (1996), 832
R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel Believed to be the RMS Titanic (Titanic II) (2002), 830
R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel Believed to be the RMS Titanic (2004), 828–35
R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel Believed to be the RMS Titanic (2006), 828–35
Robel; United States v. (1967), 190
Robinson v. Government of Malaysia (2001), 625
Rodriguez v. Drummond Co. (2003), 476–79

Rodriguez v. Transnave, Inc. (1993), 564
Rodriguez v. Republic of Costa Rica (2002), 595
Roeder v. Iran (2003), 560, 582
Romero v. Drummond Co. (2003), 476
Romero v. International Terminal Operating Co. (1959), 151
Roper v. Simmons (2005), 354, 366
Rose v. Himely (1807), 469
Royal and Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc. (2006), 950–53
Rubin v. Iran (2006), 564–72, 621
Ruiz v. Drummond Co. (2004), 476
Rumsfeld v. Padilla (2004), 1197, 1210

S
Saavedra Bruno v. Albright (1999), 24, 1192
Sacks v. Office of Foreign Assets Control (2006), 1015–19
St. Cyr; INS v. (2001), 37–39, 153–54
Salazar v. Iran (2005), 582
Salmon Spawning & Recovery Alliance v. U.S. Dep't of Commerce (2006), 876
Sanchez-Llamas v. Oregon (2006), 63–75, 79, 79*n,* 81
Sarei v. Rio Tinto (2002), 444, 948, 949
Sarei v. Rio Tinto (2006), 431–50, 946–50
Saroop, United States ex rel. v. Garcia (1997), 156–57, 521
Saudi Arabia v. Nelson (1993), 549, 648, 681
Save Our Valley v. Sound Transit (2003), 82
Schlesinger v. Councilman (1975), 1150
Schlesinger v. Reservists Comm. to Stop the War (1974), 456
Schneider v. Kissinger (2005), 456, 457, 522, 525, 526, 540, 541, 544
The Schooner Exchange v. McFaddon (1812), 569, 611, 631, 632, 668
*S.D. Myers Inc. v. Canada (2002), 720, 724
Sealed Case No. 98-3077, In re (1998), 611
Seattle Totems Hockey Club, Inc. v. National Hockey League (1981), 955, 957
Shao v. Link Cargo (Taiwan) Ltd. (1993), 919
Shaughnessy v. United States ex rel. Mezei (1953), 1190, 1191
Shillitani v. United States (1966), 605
Sidali v. INS (1997), 156, 158
Siderman de Blake v. Republic of Argentina (1992), 681
Sidhu v. Gonzales (2006), 36
Si Lu Tian; United States v. (2003), 586
Simon, In re (Hong Kong & Shanghai Banking Corp. v. Simon) (1998), 947, 948
Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp. (2007), 964*n*

Small v. United States (2005), 857
Smith v. Socialist People's Libyan Arab Jamahiriya (1997), 648
Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co. (2006), 922
Sosa v. Alvarez-Machain (2004), 76–77, 85, 431, 433, 436–38, 441–45, 447, 451, 452, 462, 464, 468, 468*n,* 469, 470, 474, 475, 478, 591, 650, 673
South African Apartheid Litig., In re (2004), 440, 447, 453–54
South African Apartheid Litig., In re (pending), 446
South Carolina v. Katzenbach (1966), 1008
Southway v. Central Bank of Nigeria (2003), 571
Spacil v. Crowe (1974), 669, 671, 679
State Dep't v. Ray (1991), 1220
State Farm Fire & Cas. Co. v. Bomke (1988), 446
Stena Rederi AB v. Comision de Contratos (1991), 575
Stratievsky; United States v. (2006), 107, 110
Stuart; United States v. (1989), 81
Suarez v. Drummond Co. (2003), 476
Sumitomo Shoji Am., Inc. v. Avagliano (1982), 661, 1217*n*
Swain v. Pressley (1977), 1182
Swift Textiles, Inc. v. Watkins Motor Lines, Inc. (1986), 920, 923, 924

T

Tachiona v. Mugabe (2001), 635, 640, 643
Tachiona v. Mugabe (2004), 635, 670, 682
Tachiona v. United States (2004), 635, 674
Tachiona v. United States (2006), 682
*Tadic; Prosecutor v. (1997), 464
Tel-Oren v. Libyan Arab Republic (1984), 470
*Tembec Inc. v. United States (2005), 702
Tembec Inc. v. United States (2006), 702
Terlinden v. Ames (1902), 157
*Terminal Forest Prods. Ltd. v. United States (2005), 702
Terrorist Attacks, In re (2005), 636
Texas Trading & Milling Corp. v. Federal Republic of Nigeria (1981), 593
Texas v. United States (1998), 159
Textile Workers v. Lincoln Mills of Ala. (1957), 446
32 County Sovereignty Comm. v. Department of State (2002), 1181
Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g (1984), 542
TMR Energy Ltd. v. State Prop. Fund of Ukraine (2005), 1009, 1010
*Tradex Hellas S.A. v. Republic of Albania (1999), 713, 714
Tran Qui Than v. Regan (1981), 1014
Transaero, Inc. v. La Fuerza Aerea Boliviana (1994), 559, 560

U
Underhill v. Hernandez (1897), 631
Ungaro-Benages v. Dresdner Bank AG (2004), 455, 520
*United Parcel Serv. of Am., Inc. v. Canada (2002), 703, 704
United States v. *See name of opposing party*
United States ex rel. *See name of related party*
Unocal Corp.; Doe I v. (2002), 463
Unterweser Reederei Gmbh, In re (1970), 955, 956, 957
USX Corp. v. Adriatic Ins. Co. (2003), 555, 556, 557

V
*Vasiljevic; Prosecutor v. (2004), 463
Velasco v. Government of Indonesia (2004), 636, 636*n,* 637
Verdugo-Urquidez; United States v. (1990), 1010, 1179, 1181
Verlinden B.V. v. Central Bank of Nigeria (1983), 551, 554, 559, 568, 569, 631
Vernonia School Dist. v. Acton (1995), 364
Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer (1995), 911, 913
Vine v. Republic of Iraq (2006), 584–92
Virginia v. Hicks (2003), 182
Virginian Ry. Co. v. System Fed'n No. 40 (1937), 605

W
Wainwright v. Sykes (1977), 74
Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines (1992), 571
Waltier v. Thomson (1960), 633, 644, 647
Wang v. Ashcroft (2003), 84*n*
Weininger v. Castro (2006), 1009
Wiebe; United States v. (1984), 132
Williams; United States v. (2006), 1135
Wong Kim Ark; United States v. (1898), 668*n*
Wong Wing v. United States (1896), 68

Y
Yamashita, In re (1946), 1143, 1144, 1154, 1183, 1208, 1209
Yancheng Baolong Biochem. Prods. Co. v. United States (2005), 611
Ye v. Zemin (2004), 679
Yerger, Ex parte (1868), 1143
Youngstown Sheet & Tube Co. v. Sawyer (1952), 522
Yue Yu v. Brown (1999), 28

Z

Zadvydas v. Davis (2001), 46–50, 1189, 1190
Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi (2000), 576
Zivotofsky v. Secretary of State (2004), 530–47
Zivotofsky v. Secretary of State (2006), 530–47
Zschernig v. Miller (1968), 454
Zych v. Unidentified, Wrecked & Abandoned Vessel (1992), 833

Index

A
Abduction
children. *See* Children, *subheading:* international abduction
Abortion
"reproductive health" in international documents as not including, 376, 384
Abu Ghraib. *See* Detainees, military, *subheading:* Iraq, prisoners held in
Act of state doctrine, 432–35, 444, 508, *632n,* 667
special missions immunity and, 680–81
Administrative Procedure Act (APA), 150–53, 158–59
Admiralty law, 831–32
Adoption
consular functions in adoption of foreign child by U.S. citizen, 98
Hague Convention on Adoption (1993)
implementation and ratification in U.S., 89–98
accreditation of agencies for, 89–95
Intercountry Adoption Act (2000), 89–94, 96, 97
record retention, 96–98
AECA. *See* Arms Export Control Act (AECA)
AEDPA. *See* Antiterrorism and Effective Death Penalty Act (AEDPA) (1996)
Afghanistan
enemy combatants. *See* Detainees, military
illicit drug production or transit, 213–14
military operations in, legal basis for, 1106–9, 1111, 1139
money laundering, 243
African Union
conflict resolution efforts, role of in Sudan, 340, 1043, 1044, 1046, 1050-1051
immunity, 684
Agent Orange litigation, 522–26

ILI-Digest-Table&Indx.indd 1319 10/22/07 11:51:48 PM

Agricultural policy and trade
biotech products, 737–39
food security, 389–94
NAFTA and. *See* North American Free Trade Agreement (NAFTA)
UN Food and Agriculture Organization, 389–94
U.S.–EU agreements, 754–55
WTO and. *See* World Trade Organization (WTO)
AIDS/HIV
implications for peace and security, 1058
international cooperation to combat, 1066–67
Air pollution
emissions trading scheme on all aircraft landing at EU airports, 871–72
ozone protection
methyl bromide, U.S. regulations implementing exemption to production of, 866–71
Montreal Protocol on Substances That Deplete the Ozone Layer (1987), amendments to, 866–71
Al-Qaida/Qaeda. *See also* Detainees, military; Law of war; Terrorism
applicability of Geneva Conventions to, 1134, 1152–53
detainees captured during actions against, 1106, 1111–12
military action against, 1106–10, 1121
unlawful combatant status, 1140*n*
Albania
expropriation claims settlement with U.S., 502–3
extradition and mutual legal assistance, 156–59
Albania–U.S. extradition treaty, 156–59
torture claims in case under, 157–59
Land Law affecting property rights in investment dispute, 713
transfer of Uighur detainees from Guantanamo to, 1116-1117, 1185
Alcoholic beverages
wine-making practices and labeling, 757
Algeria
conflict resolution
Ethipia-Eritrea, involvement in, 1055–58
Western Sahara, actions needed in, 1065
money laundering, 243
Alien Tort Statute (ATS), 430–36
act of state and, 432
countries
Colombia. *See Mujica v. Occidental Petroleum Corp.* (450-55); *Rodriguez v. Drummond* (476-78)
Haiti. *See Doe v. Constant* (478-79)
Papua New Guinea. *See Sarei v. Rio Tinto* (431-50)

Alien Tort Statute (ATS) (continued)
countries (continued)
Sudan. *See Presbyterian Church of Sudan v. Talisman* (460-65)
United States. *See Bancoult v. McNamara* (455-59); *Jogi v. Voges* (75–77)
exhaustion of remedies requirements, 433–35, 436, 448–50
extraterritorial application, 437–41, 451–52
federal common law, 431, 441–45, 450–51, 465–76
foreign policy implications of cases under, 431–33, 450, 456–59, 476–79
immunity of foreign government officials, 629
international comity doctrine and, 450, 944–50
international law violations alleged
consular notification, failure of. *See Jogi v. Voges* (75-77)
disproportionate use of force. *See Matar v. Dichter* (465-76)
law of the sea. *See* Sarei v. Rio Tinto (433, 444-45)
political question and, 431–33, 450–59
secondary liability
aiding and abetting, 446–48, 452–54, 463–65
conspiracy, 460–63
state law claims, and, 454–55
Aliens. *See* Immigration and visas
asylum. *See* Asylum
citizenship. *See* Citizenship
detainees. *See* Detainees, military; Detention of aliens, nonmilitary
removal. *See* Removal of aliens from U.S.
American Servicemembers' Protection Act (2002)
military assistance, definition of, 279
waivers to prohibition on assistance, 278
Angola
money laundering, 243
Anti-suit injunctions, 953–63
Antiquities Act (1906), 872
Antiterrorism and Effective Death Penalty Act (AEDPA) (1996)
designation of Foreign Terrorist Organizations
criminalizing material support to, 185–86
standard of judicial review, 191–92
Foreign Terrorist Organizations Sanctions Regulations, 991
retroactivity, 37
terrorism exception to Foreign Sovereign Immunities Act, 577
Antitrust law
judicial assistance in litigation, 969–70
APA. *See* Administrative Procedure Act (APA)
APEC. *See* Asia-Pacific Economic Cooperation (APEC)
Apostille
language of, 105–7

Appropriations Acts
Department of Homeland Security Appropriations Act (2007), 9
Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (REAL ID Act) (2005), 206–7
Foreign Operations, Export Financing, and Related Programs Appropriations Act
(1996), 578
(2006), 279
Arbitration
FSIA immunity and attachment of award, 612–21
Argentina
Hague Child Abduction Convention, compliance with, 100
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, 238
waiver of immunity on tax issue, 596–97
Armed conflict. *See also* Geneva Conventions on law of war (1949); Law of war; Military activities; War crimes; *specific countries and wars*
children in, 387–89
detainees in. *See* Detainees, military
law enforcement vs., in antiterrorism effort, 1105, 1111–12
Multinational Force in Iraq. *See* Multinational Force in Iraq
prisoners of war. *See* Prisoners of war
protection of humanitarian workers in, 1076–77
riot-control agents in warfare, 1223–25
treaty obligations, effect on, 295
UN disabilities convention (draft), U.S. comments on, 384
war on terror. *See* War on terror
Arms control. *See also* Arms Export Control Act (AECA); Law of war; Nonproliferation
air defense systems, man-portable (MANPADS), 210–11
biological weapons. *See* Biological weapons
chemical weapons. *See* Chemical weapons
mines
Declaration on anti-vehicle mines, 1089–93
landmines, 1085–94
Prohibitions or Restrictions on the Use and Transfer of Mines Other than Anti-Personnel Mines (MOTAPM), 1087–89, 1092
nuclear. *See* Nonproliferation
Strategic Arms Reduction Treaty. *See* Strategic Arms Reduction Treaty (START)
Wassenaar Arrangement, 1300–1301

Arms Export Control Act (AECA)
antiterrorism activities, countries not cooperating fully with U.S., 172
Libya, rescission of designation as state sponsor of terrorism, 173
North Korea, sanctions in response to nuclear detonation by, 1271
Arrests
consular notification. *See* Consular notification and access
ASEAN (Association of Southeast Asian Nations), 760–61
Asia-Pacific Economic Cooperation (APEC), 209
Multilateral Framework for Regional Movement Alert (RMAL) System, 17
Association of Southeast Asian Nations (ASEAN), 760–61
Asylum. *See also* Refugees
Uzbek asylum seekers returned to Uzbekistan by Ukraine, 60–61
Atomic Energy Act (1954), 1271
Atomic Energy Agency, International (IAEA)
Additional Protocol to bilateral Nuclear Safeguards Agreements with U.S., 1296–97
India and, 1284
Iran and, 1272–84
North Korea and, 1268
nuclear fuel, reliable access, 1292–93
Nuclear Terrorism, Global Initiative to Combat, 1293–96
Australia
compulsory pilotage scheme for Torres Strait, 810–12
cooperation in antiterrorism actions, 210
immunity, Australian Foreign States Immunities Act, 609
indigenous peoples, UN declaration on, 394–401
most-favored-nation status, 755
Nuclear Terrorism, Global Initiative to Combat, 1295–96
Regional Movement Alert List pilot, 209
WTO complaint related to Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), 707
Austria
extradition and mutual legal assistance, 136, 146
Hague Child Abduction Convention, compliance with, 101
Authentication
Legalization of Foreign Public Documents, Hague Convention on (1961), 105–10
Authorization Acts
Foreign Relations Authorization Act
(1999, Admiral James W. Nance and Meg Donovan), 88
(2003), 213, 530–45
National Defense Authorization Act (2006), 279, 1224

Authorization Acts (continued)
State Department Authorities Act (2006), 210–11
Trafficking Victims Protection Reauthorization Act (2005), 1066
Automobiles
WTO dispute brought by U.S. against China, 741–42
Aviation issues
air carriers, U.S., control by non-U.S. entities, 685–86
emissions trading scheme on all aircraft landing at EU airports, 871–72
Immigration Advisory Program at airports, 209
interdiction of aircraft involved in drug trafficking, U.S. assistance in, 225–26
International Civil Aviation Organization (ICAO), 14, 208
dues, impermissible imposition of, 871
passenger data, ECJ ruling on and negotiation of U.S.-EU replacement agreement, 168–72
Azerbaijan
intellectual property rights, 769

B
Bahamas
Hague Child Abduction Convention, compliance with, 102
illicit drug production or transit, 213
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, 238
Bahrain
free trade agreement with U.S., 765–66
Ballistic missiles
North Korea's launch of, 1265–68
Bank Secrecy Act (2001), 243, 246
Bankruptcy law, 930
Barbados
U.S. military assistance, 278
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 863–65
Belarus
immigration, suspension of entry (Presidential Proclamation 8015), 42–44
intellectual property rights Watch List, 768
Belgium
extradition and mutual legal assistance, 136, 146, 290–92
Terrorist Bombings Convention, reservation to, 288–91

Belize
intellectual property rights Watch List, 768
trafficking in persons, 229
Bering Sea
fish and marine mammals, 885–86
Bermuda
passport requirements for U.S. entry or departure
air travel, 4–9
passport cards for sea travel, 11–13
Bills of lading
backdating claim dismissed on *forum non conveniens,* 963–65
Carmack Amendment or COGSA applicable, claims concerning, 918–28
international rules for, 904, 910–11
Biological Diversity, Convention on, 888
Biological weapons.
Biological and Toxic Weapons Convention (BWC) (1972) Sixth Review Conference, U.S. statement to, 1238–43
nonproliferation
Iran, 1240
North Korea, 1240
Syria, 1240
Bolivia
cultural property protection agreement, 897, 901
illicit drug production or transit, 213, 214
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, 238
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Bombings
Convention for suppression of terrorist bombings, reservations to, 288–91
Border issues. *See also* Canada; Law of the Sea, UN Convention on (UNCLOS); Maritime issues; Mexico
human rights issues in U.S. border control policy, 210
Secure Fence Act of 2006, 50–52
Security and Prosperity Partnership for North America, 207
Botswana
forest conservation agreement, 886–88
Bovine spongiform encephalopathy
NAFTA Chapter 11 disputes, 693–701

Brazil
drug trade
illicit drug production or transit, 213
interdiction assistance, 225–26
sacramental tea with hallucinogen, 221–25
evidence gathering abroad, 966–69
Hague Child Abduction Convention, compliance with, 101–2
intellectual property rights Watch List, 768
most-favored-nation status, 755
U.S. military assistance, 278
Bulgaria
intellectual property rights Watch List, 768
Burma
child soldiers, 387–89
drug trade, 212–13
illicit drug production or transit, 213
human rights violations in, 1058–60
religious freedom, 377
resettlement of refugees from, 52–55
Chin National Front or Chin National Army members, 55
Karen National Union or Karen National Liberation Army members, 53–55
trafficking in persons, 228
UN Security Council, placement on agenda of, 1058–60
Byrd Amendment (Continued Dumping and Subsidy Offset Act of 2000), 703*n,* 706–8

C
California
Desert Protection Act (1994), 718
gold mining and NAFTA Chapter 11 dispute, 709–26
Sacred Sites Act (1976), 714
Surface Mining and Reclamation Act (1975) and regulations, 714, 715, 722
Cambodia
democratic processes in, 487
trade and investment agreement with, 761
Canada. *See also* North American Free Trade Agreement (NAFTA)

Canada (continued)
border issues
air travel and passport requirements, 4–9
counterterrorism cooperation, 210
passport cards for pedestrian, vehicular traffic, and sea travel, 11–13
counternarcotics effort, 214
environmental and conservation issues
CERCLA violations, 855–59
Pacific Salmon Agreement, 875–78
U.S.–Canada water pollution settlement agreement, 859–60
immunity
Canadian State Immunity Act, 609
of instrumentalities of government, 550–58
intellectual property rights Watch List, 768, 769
Inter-American Convention Against Corruption, party to, 238
most-favored-nation status, 755
Northwest Passage, U.S. vessels transiting, 814–15
Nuclear Terrorism, Global Initiative to Combat, 1295–96
Titanic protection agreement, 828–35
trade with U.S.
Free Trade Implementation Agreement (1988), 726, 727
softwood lumber trade, 762–63; *See also* North American Free Trade Agreement; World Trade Organization
WTO disputes. *See* World Trade Organization (WTO)
Cape Town Convention on International Interests in Mobile Equipment (2001)
Protocol for Space Equipment, 931–34
Capital punishment
consular relations and. *See* Consular Notification and Access
extradition restrictions, EU–U.S. agreement, 133–34
International Covenant on Civil and Political Rights, U.S. reservation on, 354, 365–66
in Iraq, 270
U.S. response to UN on, 354, 365–66
Caribbean travel
passport cards for sea travel, 11–13
Carmack Amendment, 918–28
Carriage of goods by sea
Carriage of Goods by Sea, Draft Convention, UNCITRAL, 903–18
delay, 914–16, 916*n*
liability limitations, 916–18
scope of coverage, 909–13
shipper's liability, 916
shipper's obligations, 913
transport documents and electronic transport records, 913
Carriage of Goods by Sea Act, 918–28

CBP. *See* Customs and Border Protection Bureau (CBP)
CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) (1980), 855–60
Chemical weapons. *See also* Nonproliferation
Chemical Weapons Convention (CWC) (1993), 1243–51
extension of deadline for destruction of stockpiles, 1243–46
implementation in U.S., 1249–51
Chemical Weapons Convention Implementation Act (1998), 1250
national implementation, 1246–49
use of riot-control agents and, 1223–25
dioxin (Agent Orange) litigation, 522–26
Child support. *See* Maintenance obligations
Children
adoption. *See* Adoption
in armed conflicts, 340, 387–89, 997, 1065–68
citizenship
child conceived in vitro, 2–3
U.S.-born child of foreign ministers, 668*n*
in criminal justice system
capital punishment of juvenile offenders, 366
sentenced to life without parole, 366–69
disappearance, draft convention on and, 428
Hague Convention on Child Abduction (1980), U.S. report on compliance by other countries with, 98–103
parental access, Jordan-U.S. memorandum of understanding on, 103
Rights of the Child, Convention on, 386
Optional Protocols, 385, 386
Sale of Children, Child Prostitution and Child Pornography, 384–85
U.S. objections, 385–87
Chile
Hague Child Abduction Convention, compliance with, 101–2
intellectual property rights Watch List, 768, 769
Inter-American Convention Against Corruption, party to, 238
China, People's Republic of
arms control and nonproliferation
Iran program and, 1276–79
Nuclear Terrorism, Global Initiative to Combat, 1295–96
Six-party talks on North Korea, 1271–72
Falun Gong movement, repression of, 662, 663, 664
forum non conveniens issues, 963–65
genocide, cooperation in opposing in Darfur, 423, 1051
Human Rights Council membership, 334

China, People's Republic of (continued)
immunity of official on special mission, 662–81
intellectual property Watch List, 768
ITER International Fusion Energy Organization, 893
Joint Communique of 1979, one China policy announced in, 545–46
most-favored-nation status, 755
North Korean refugees in, 57
passports and Taiwan, 545–46
religious freedom, 377
Uighurs and, 1184–85
Cigarettes
Master Settlement Agreement, 690
NAFTA Chapter 11 disputes, 688–93
Citizenship
of airline corporation under control of U.S. citizens, 685–86
children
child conceived in vitro, 2–3
U.S.-born child of foreign minister, 668*n*
indigenous people and, 396
passports, requirements for travel, 5–8
proof of U.S., 5–8
statelessness, 1–2
Civil rights, U.S.
Justice Department, U.S., Civil Rights Division, 418
Civil Rights of Institutionalized Persons Act (CRIPA) (1980), 368–69, 412, 417
Clean Air Act (CAA) (1990), 866, 868, 869
Climate change
UN Framework Convention on, 853–55
CNMI (Northern Mariana Islands, Commonwealth of)
control of submerged lands, 315–16
Coalition Provisional Authority (CPA). *See* Iraq
Coffee
International Coffee Organization, 493–94
Colombia
Alien Tort Statute (ATS) issues, 450–55, 476–78
comity as basis for dismissal of suit in U.S. court, 945–46
cultural property protection agreement, 897–99
drug trade
illicit drug production or transit, 213
interdiction assistance, 225–26
foreign affairs implications of lawsuit, 450–55
free trade agreement, 764–65

Colombia (continued)
Hague Child Abduction Convention, compliance with, 102
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
political question doctrine, 450–55, 945–46
Colorado
agreement on accreditation of adoption agencies for intercountry adoptions, 92–95
Comity
abstention on basis of, 944–53
Alien Tort Statute (ATS), application of, 450, 946–50
Holocaust-era victim claims, 518, 520–21
Commercial law. *See also* Carriage of goods by sea
development policies and, 928–31
electronic commerce, 934–38
secured transactions, 929–30
securities held through intermediaries, 936
Committee on Foreign Investment in U.S. (CFIUS), 774–80
Common law. *See also* Customary international law
admiralty, 831–32
immunity of foreign officials under, 630–43
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980), 855–60
Conflict resolution. *See also* Peacekeeping missions; United Nations
in Congo, Democratic Republic of, 996–98, 1001
Ethiopia–Eritrea, 1055–58
in Lebanon. *See* Lebanon
in Middle East. *See* Middle East Conflict, Israeli-Palestinian
in Western Sahara, 1064–65
Congo, Democratic Republic of
child soldiers in, 387
conflict resolution efforts, 996–98
immunity of diplomatic properties from attachment, 621–29, 658–62
sanctions on, 996–98
Congo, Republic of
contempt sanctions, contrary to FSIA, 603–11
Darfur conflict resolution and, 1050-1051
no waiver of immunity under FSIA, 562–64
Constitution, U.S.
Articles:
I, 523, 734, 1141, 1142
II, 66, 522, 661, 664, 665, 668, 674, 677, 678–79, 732, 869, 1141

Constitution (continued)
Articles (continued)
III, 71, 83, 456, 523, 532, 729–30, 1141, 1204, 1206
antiterrorism statutes, challenges to as unconstitutional
designation of terrorists and terrorist organizations, 180, 183–99
criminal penalty for support of designated entities, 180–82
capital punishment and, 354, 365
cruel and unusual punishment, 347, 354, 355, 406, 409–12, 419, 1129, 1134, 1173
Eighth Amendment, 354
on exclusion of evidence, 67
extraterritorial application, 1177–82, 1199, 1212–13
Fifth Amendment, 67–68, 183, 317, 352, 484, 712, 1006, 1008–15
First Amendment, 19, 23, 25–26, 79, 117, 183, 184, 189–90, 191, 198, 201, 204, 284, 350, 714
foreign affairs authority, 457, 540, 664, 668, 674, 678
Fourteenth Amendment, 115, 668*n,* 712
Fourth Amendment, 120–21, 364, 365
NAFTA compliance with, 726–37
nonresident aliens, 27, 1181
Suspension clause, 1177, 1180–82
treaties, 66, 71, 125
War Powers Clause, 523
Consular functions, 88–89. *See also* Consular Relations, Vienna Convention on (VCCR); Diplomatic missions and personnel
death and estate of U.S. citizens and foreign nationals abroad, 88
immunity for, 308–11
international adoption, 98
nonreviewability of visa decisions, 23–25
notification. *See* Consular notification and access
Consular notification and access
bilateral agreements not necessary, 88–89
failure to afford (VCCR Article 36(1)(b)) by U.S. authorities, issues concerning
law enforcement and, 75–86
Mexican nationals, 86–88, 1023
remedies for, 63–75
suppression of evidence obtained prior to, 63–75
U.S. litigation over damage claims against law enforcement officials, 75–86
ICJ cases concerning, 70–74, 1026
Presidential determination pursuant to *Avena,* 87, 1026

Consular offices and personnel. *See also* Consular functions; Consular Relations, Vienna Convention on (VCCR); Diplomatic missions and personnel
Puerto Rican sovereignty, implications of, 312–14
Consular Relations, Vienna Convention on (VCCR). *See also* Consular functions; Consular notification and access; Consular offices and personnel
Articles:
5, 103
36, 63–70, 72–74, 75, 77–82, 86
Compulsory Settlement of Disputes, U.S. withdrawal from Optional Protocol Concerning, 1026
Contempt sanctions. *See* Sanctions
Continental Shelf
Commission on the Limits of the Continental Shelf, 806
Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment or CDSOA), 703*n,* 706–8
Controlled substances. *See* Drug trade
Conventional weapons
Convention on (CCW), 1085–1100
Amendment to Article 1, transmittal for advice and consent to U.S. ratification, 1094–97
incendiary and laser weapons, 1093–94
landmine control, 1086
Protocol V, transmittal for advice and consent to U.S. ratification, 1097–1100
COPUOS (UN Committee on Peaceful Uses of Outer Space), 847–51
Corporate responsibilities and rights
air carrier's ownership structure and citizenship requirements, 685–86
Corruption
Belarus, 42–44, 983–84
conventions on
Inter-American convention against corruption (1996), 237–38
OECD convention on bribery of foreign public officials, 287–88
UN convention against corruption, 229–33
Latvia, 251
National Strategy Against High-Level Corruption, 234–37
Nigeria, 215, 483
Palestinian government, 1027
suspension of entry of persons involved in, 42–44
Syria, 247
Costa Rica
intellectual property rights Watch List, 768

Costa Rica (continued)
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Cote d'Ivoire
sanctions on, 995–96
Council of Europe
Cybercrime Convention, 239–41
Sentenced Persons, Convention on Transfer of, 104–5
state immunity, convention, 599
Venice Commission on renditions, 161–62
Courts. *See also* Criminal tribunals, international and hybrid; International Court of Justice (ICJ)
Military Commissions. *See* Military commissions for trial of certain non-U.S. enemy combatants
Nuclear Claims Tribunal, Republic of Marshall Islands, 316–25
Crime. *See also* Criminal tribunals, international and hybrid; Law enforcement; Mutual legal assistance
conspiracy to overthrow government, 203–4
cybercrime, Council of Europe Convention on, 239–41
extradition. *See* Extradition
immigration and removal of criminal aliens, 33–36
inchoate crimes, 203–4
money laundering. *See* Money laundering
sedition, 203–4
smuggling. *See* Trafficking in persons
solicitation, 202–3
war crimes. *See* War crimes
Crimes against humanity
Alien Tort Statute jurisdiction, 460–65
Criminal tribunals, international and hybrid, 254–79
International Criminal Court. *See* International Criminal Court (ICC)
Iraqi High Tribunal, 259–60, 269–73
Lebanon, 257, 272–75
Rwanda. *See* International Criminal Tribunal for Rwanda (ICTR)
Sierra Leone, Special Court for, 275–77
Yugoslavia. *See* International Criminal Tribunal for Former Yugoslavia (ICTY)
Croatia
intellectual property rights Watch List, 768
U.S. military assistance, 278
Cruel and unusual punishment, 355. *See also* Capital punishment

Cuba
antiterrorism efforts, noncooperation with, 172
Commission for Assistance to a Free Cuba, 998
Human Rights Council membership, 334
human rights in, 343–46
immigration issues
family reunification policy, 40–41
medical personnel from Cuba, ability to apply for parole at U.S. embassy in third country, 41–42
U.S. refugee policy, 40–42, 56
nonproliferation, 1298–99
sanctions on
trafficking in persons, 228
travel restrictions, U.S. embargo, 998
trademark litigation, 796–801, 1006–15
trafficking in persons in, 228
Cultural issues
Antiquities Act (1906), 872
Cultural Property, Convention on Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of (UNESCO) (1970), 219, 897
Cultural Property Implementation Act (1983), 897
Native Hawaiian cultural activities, Northwestern Hawaiian Islands Marine National Monument, 872–75
Customary international law
bilateral investment treaty, expropriation and minimum standard of treatment, 790–96
cause of action, 433–35
not providing except as allowed under Alien Tort Statute, 468*n*
common law, federal and, 77
consular and diplomatic relations, 499
diplomatic protection, 499–502
environmental issues and, 1077–84
exhaustion of remedies, 502
extradite or prosecute obligation and, 159–60
humanitarian relief personnel, treatment of, 1076–77
immunity and inviolability
diplomatic, 671–72, 671*n*, 675–78, 680
sovereign, 614, 640–44, 648
UN immunity convention and, 641–42
judicial assistance and, 107–8
jus cogens and, 646–50
law of the sea
exclusive economic zone, 817–18
UNCLOS provisions reflecting, 444, 815–21

Customary international law (continued)
law of the sea (continued)
wrecks, draft convention on, 815–21
law of war
herbicide use during Vietnam War not prohibited by, 525
humanitarian law, ICRC study on, 1069–85
use of nuclear weapons not violating, 1256, 1263
NAFTA Article 1105(1) as incorporating (minimum standard of treatment of aliens), 710, 720–26
opinio juris, 722, 1073–75
standing of corporations and shareholders, 501
state practice, 159, 671, 1071–73
Vienna Convention on Law of Treaties as reflecting, 287–88, 392
wrongful acts done under governmental authority, 645*n*
Customs and Border Protection Bureau (CBP)
airline passenger name record data for flights between U.S. and EU, 168–72
confiscation of fraudulent travel documents, 208–10
Cybercrime Convention (Council of Europe), 239–41
Cyprus
cultural property protection agreement, 897, 899–901
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 136, 146
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Czech Republic
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 136, 146

D
Darfur. *See also* Sudan
conflict resolution efforts, 1042–54
Addis Ababa high-level meeting on, 1050–54
Darfur Peace Agreement, 342, 978, 1042–54
Darfur Peace and Accountability Act (2006), 978–83
N'djamena Ceasefire Agreement, 1046
peacekeeping forces in, 1043–54
role of African Union in, 340, 1050–51
genocide, 422–23
UN Human Rights Council, special session on, 340-341
UN Security Council actions, 975, 1043, 1047, 1053
referral to ICC, 258
U.S. condemnation of violence in, 1046

Death penalty. *See* Capital punishment
Deficit Reduction Act (2005), 16, 708, 744
Democracy
promotion of, 486–87
Democratic People's Republic of Korea. *See* Korea, North (Democratic People's Republic of Korea (DPRK))
Democratic Republic of Congo. *See* Congo, Democratic Republic of
Denmark
extradition and mutual legal assistance, 136, 146
Deportation
of stateless persons, 2
Detainees, military. *See also* Military commissions for trial of certain non-U.S. enemy combatants; Multinational Force in Iraq; Torture
Combatant Status Review Tribunals for Guantanamo detainees, 1114, 1135, 1140
Commission on Human Rights, UN, U.S. response to Special Rapporteurs, 1117–24
Committee against Torture, UN
U.S. reports to, 1124–36
U.S. response to conclusions and recommendations (May 2006), 1136–37
Detainee Treatment Act (DTA 2005), 402, 406–7, 1114, 1126, 1130, 1136, 1138, 1159, 1162, 1166, 1167, 1174, 1181–83, 1185*n*
detention, treatment, and trial of, U.S. laws and procedures governing, 1113–16, 1126, 1132–33, 1139
updated Department of Defense detention and treatment policies, 1130, 1155–56, 1163–68
documents and photographs, litigation concerning legal protection of, 1213–23
enemy combatants, unlawful
access to counsel or courts, 360–61, 1111–12
Afghanistan, treatment of detainees held in, 407, 1108, 1127, 1133, 1157
authority to detain, 1106–9
definition of, 1140*n*
due process, 1175–76, 1198
ICRC access to, 1125, 1127, 1161
interrogations, 1123–24, 1130, 1132–33
coerced statements, inadmissibility of, 1135
education and training for personnel conducting, 1131
law of war vs. criminal law enforcement and, 1105, 1111–12
not prisoners of war, 1112–16, 1117
Geneva Convention protections, 1133, 1154, 1155–56, 1163–64, 1170. *See also* Geneva Conventions, *subheading:* on law of war (1949); *specific Geneva conventions*

Detainees, military (continued)
Guantanamo, enemy combatants held in
Administrative Review Boards, 1114, 1135
authority to hold, 1184–94
FOIA requests for documents related to, 1218–23
future closure of Guantanamo detention facilities, 1116–17
law of war and, 1112–16, 1121, 1125
military commissions. *See* Military commissions for trial of certain non-U.S. enemy combatants
status as no longer enemy combatants, 1184–94
transfer or release, 1116–17, 1161, 1184–94
treatment, 1132
updated military guidance, 1163–68
U.S. response to UN Commission on Human Rights, 1117–24
habeas availability, litigation concerning Guantanamo detainees, 1138, 1141–42, 1174, 1176, 1177–83
access to counsel, 1121
U.S. constitutional protections, whether applicable, 1104–17
Iraq, prisoners held in
Abu Ghraib, FOIA cases involving, 1213–18
habeas availability, 1206–13
secret detentions outside U.S., 1157–60
transfer of CIA detainees to Guantanamo, 1104, 1156–63
Detention of aliens, nonmilitary
consular notification, 63–88
limits on length of pending removal, 45–50
Development
Development Fund for Iraq, 1235–38
DHS. *See* Homeland Security, Department of (DHS)
Diamond trade, 1060
Dioxin (Agent Orange) litigation, 522–26
Diplomatic missions and personnel
attachment of property, 626–29, 658–62
establishment of, 527–30
immunity
certification by Department of State as to presence or absence of, 654, 662–66
courts bound by, 666–67, 669–73, 678–80
of diplomatic personnel, 682
recognition by receiving state as requirement for, 653–57
special missions immunity, 662–81

Diplomatic missions and personnel (continued)
immunity (continued)
from taxes and dues, 593, 597–98
U.S. procedures for requests for, 659*n*
of U.S. foreign service officer in line of duty abroad, 308–11
inviolability
of foreign dignitaries attending UN conference to service of process, 681–82
of missions, 627, 658, 660
protection of diplomatic property, 499–502
U.S.–Libya relations, 527–28
Diplomatic Relations, Vienna Convention on. *See also* Diplomatic missions and personnel
Articles:
4, 653
22, 627, 658
31, 598, 653
39, 659*n*
immunity provided by
extended to non-parties in U.S. through Diplomatic Relations Act, 676*n*
special missions immunity as distinct from immunity of permanent missions under, 675–78
inviolability from service of process, 682
as treaty pre-existing FSIA so applicability preserved by, 626
Diplomatic relations and recognition
recognition, exclusive Presidential authority over, 542
Disabilities, persons with
Persons with Disabilities, draft Comprehensive and Integral International Convention on the Protection of, 382–84
adoption of, 383
U.S. not party to, 284, 382–83
Disappearances. *See* Human rights, *subheading:* enforced or involuntary disappearances
Discrimination
disabled. *See* Disabilities, persons with
gender, 372–76
race. *See* Racial discrimination
Divorce
evidence taken abroad, 966–69

Dolphin protection. *See* Fish and marine mammals
Dominican Republic
Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), 764
illicit drug production or transit, 213
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
DPRK. *See* Korea, North (Democratic People's Republic of Korea (DPRK))
Drug trade, 212–16
aerial interdiction assistance involving lethal force, 225–26
Controlled Substances Act (CSA), 34, 35–36, 223
Foreign Narcotics Kingpin Designation Act (1999), 220–21
Inter-American Drug Abuse Control Commission (CICAD), 220
International Narcotics Control Board, 219
methamphetamines
Combat Methamphetamine Epidemic Act (CMEA) (2006), 215–16
International Narcotics Control Strategy Report and, 216–20
Project Prism, 219
religious use of controlled substances, 221–25
treaties and international agreements
Illicit Drug Traffic, UN Convention on (1988), 219, 221–25
ship-boarding agreements, 838–40
U.S. narcotics report and certification
designations and certifications, 212–16
International Narcotics Control Strategy Report, 212, 216–20
Dubai Declaration on chemicals management, 865–66
Dubai Ports World, 774–80
Due process. *See also* Constitution, U.S.
designation of terrorist organization as claimed violation of, 197–98, 1000–1001
habeas corpus claims by U.S. citizens detained in U.S. as enemy combatants, 1175–76, 1198
trademark denial, Cuban litigation over, 1010–13
in U.S. Constitution, 67, 729
Dumping
NAFTA Chapter 11 and Chapter 19 disputes, 702–9

E
E-passports, 13–15, 208
Early Release Scheme
UK policy, 123

Ecuador
anti-suit injunction, 953–58
drug trade
illicit drug production or transit, 213, 214–15
ship-boarding agreements, 838–40
Hague Child Abduction Convention, compliance with, 101
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Educational exchange
Iran, 989–90
Egypt
intellectual property rights Watch List, 768
Terrorist Bombings Convention, 288–91
El Salvador
family support enforcement, 942
Inter-American Convention Against Corruption, party to, 238
Electronic commerce, 935–38
UNCITRAL model laws, 934–36
Embargoes. *See* Sanctions; Trade
Embassies. *See* Diplomatic missions and personnel
Emergency Economic Powers Act, International (IEEPA)
authority exercised
Belarus, 984
Iran, 986–90
Sudan, 975–77, 979
Chemical Weapons Convention and, 1250
UN Participation Act and, 1017–19
Entry requirements into U.S. *See* Immigration and visas; Passports, U.S.
Environmental issues. *See also* Fish and marine mammals; Marine conservation; Maritime issues
armed conflict and, 1077–84
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 863–65
biological diversity protection, Convention on, 888
chemicals management, strategic approach to, 865–66
Clean Air Act. *See* Clean Air Act (CAA) (1990)
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980), 855–60
customary international law, 1077–84

Environmental issues (continued)
forest conservation
Debt-for-Nature Agreements, 886–88
Indonesia logging initiative, 801–3
Tropical Forest Conservation Act (1998), 887
hazardous activities, transboundary harm arising from, International Law Commission on, 861–62
natural resources, shared, 862–63
wilderness areas, regulation of, 718–19
Eritrea
Ethiopia peace agreement (2000), 1055–58
religious freedom violations, 377
Estonia
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 127, 137, 138–39, 146
Ethiopia
Eritrea peace agreement (2000), 1055–58
Eurojust
DOJ agreement with, 163–67
European Commission
access to airline passenger data, 168–72
European Community
customs, administration of, 739–40
European Convention on State Immunity, 599, 603, 607
European Court of Justice
rulings on airline passenger name record data, 168–72
European Union
counterterrorism recommendations, 210
emissions trading scheme to include all flights at EU airports, 871–72
Eurojust, DOJ agreement with, 163–67
Europol, U.S. agreement with, 164
extradition and mutual legal assistance, 127–47
intellectual property rights Watch List, 768
ITER International Fusion Energy Organization, 893
in Middle East conflict resolution, 1031. *See also* Middle East Conflict, Israeli-Palestinian, *subheading:* Quartet statements
passenger data, ECJ ruling on and negotiation of U.S.-EU replacement agreement, 168–72
trade. *See also* World Trade Organization (WTO)
agricultural and industrial trade, 754–55
customs, administration of, 739–40
wine-making practices and labeling, 757

Evidence
discovery
gathering of evidence abroad, 966–70
Hague Convention on (1970), 108
letters rogatory to obtain, 107–10, 966*n*
Executive Branch
no authority for court to order Executive to parole alien into U.S., 1191–94
Executive Orders, Presidential
Belarus, sanctions against (No. 13405), 983–84
Chemical Weapons Convention, implementation of (No. 13128), 1250
classified information, criteria for (No. 12958), 1222
Congo, sanctions against (No. 13413), 996–98
Cote d'Ivoire, sanctions against (No. 13396), 995
designation of countries not cooperating with antiterrorism efforts (No. 11958), 172
Iran, sanctions against (12957; 12959; 13059), 987
Iraq, sanctions on (No. 12722; 12724), 1016, 1018
Libya, sanctions on (No. 13222), 173
on national security implications of foreign investment in U.S. firms (No. 11858), 774, 777
Puerto Rico task force (No. 13183; 13209; 13319), 311
riot-control agents in warfare (No. 11850), 1223–25
Sudan, sanctions against (No. 13067; 13400; 13412), 975, 979, 980, 981, 982
Syria, sanctions against (No. 13338; 13399), 984–86
terrorism
designation of terrorist entities (No. 12947; 13224), 183–91, 205–6, 356, 991
information sharing (No. 13388), 171
weapons of mass destruction (No. 13382), 1297
Exhaustion of remedies. *See* Remedies
Exon-Florio amendment, 777–80
Explosives offenses
extradition treaty and, 114–16
Export Administration Act (1979)
Iran Nonproliferation Act of 2000 and, 1299
terrorism supporting states, 577
Iraq, rescission of determination as, 179
Libya, rescission of determination as, 173
Export Administration Regulations, 177–80, 989, 990, 1299, 1300–1301

Expropriation
Albania-U.S. claims agreement, 502–3
claims against U.S. in NAFTA arbitration, 711–15
Foreign Sovereign Immunities Act exception to immunity for, 572–77
Extradition. *See also* Mutual legal assistance; Prisoner transfer
denial of, possible bases for
capital punishment, 133–34
political offense exception, 114–16, 122–27
International Law Commission (ILC) on extradite or prosecute requirements, 159–60
judicial review, 148–59
treaty between U.S. and UK, 118–19
non-inquiry, rule of, 148–51, 155, 156
of terrorists, 122–27
treaties, bilateral, 111–39
specific treaties between U.S. and
EU, 127–38
U.K., 111–27
U.S. practice
judiciary, finding of extraditability, 118–19
provisional arrest, 120
Secretary of State's non-reviewable authority to surrender following court's determination of extraditability, 148–59
Torture Convention, implementation of, 157–59
waiver of rule of specialty, 121–22

F
False Claims Act (FCA)
applicability to Iraq Coalition Provisional Authority (CPA), 301–5
Family support obligations. *See* Maintenance obligations
FAO (UN Food and Agriculture Organization), 389–94
FARR Act (Foreign Affairs Reform and Restructuring Act of 1998). *See* Foreign affairs
Federal Tort Claims Act (1946)
suit against U.S. foreign service officer for tort committed in line of duty abroad, 308–11
Financial transactions
corruption. *See* Corruption
FinCEN (Financial Crimes Enforcement Network). *See* Money laundering
Finland
EU accession and trade agreements, 755–56
extradition and mutual legal assistance, 137, 146
family support enforcement, 942

First Amendment. *See* Constitution, U.S.
Fish and marine mammals. *See also* Marine conservation
Bering Sea pollock resources, 885–86
Canada–U.S. Pacific salmon agreement, 875–78
Conservation and Management of Pollock Resources in the Central Bering Sea, Convention on, 885–86
Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement 1995), 880
dolphin protection in tuna harvesting, 883–85
Dolphin Protection Consumer Information Act (1991), 883
International Dolphin Conservation Program Agreement and Act (1997), 884
Marine Mammal Protection Act (1972), 880
sea turtle protection, shrimp import restrictions for, 882–83
sustainable fisheries
UN Fish Stocks Agreement, 880
UN General Assembly resolutions on, 880–82
whaling regulation, 878–80
Iceland undermining of, 878–80
Fishermen's Protective Act (1967), 879
Fissile Material Cut Off Treaty (FMCT), 1289–91
Flatow Act. *See* Foreign Sovereign Immunities Act (FSIA) (1976)
FMCT (Fissile Material Cut Off Treaty), 1289–91
Food
Committee on World Food Security, 389–94
Foreign affairs. *See also* Diplomatic relations and recognition; Executive Branch; National security, U.S.; President, U.S.; *specific countries*
contempt sanctions against foreign state, no enforcement of, 603–11
Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), 148–55, 158, 485
Foreign Relations Authorization Act (2003), 213, 217
nonjusticiable questions in litigation, 450–59, 482*n,* 507–26, 588–89
Foreign Assets Control Regulations, 1299–1300
Foreign Assistance Act (FAA) (1961)
Libya, rescission of designation as sponsor of terrorism, 173
lifting of prohibition on military assistance, 278
narcotrafficking, 213, 216–17
Palestinian Authority, limitation on assistance to, 993–95

Foreign Assistance Act (FAA) (1961) (continued)
sanctions for transfer of MANPADS, 211
terrorism supporting states, 577
West Bank and Gaza, limitation on assistance for, 993–95
Foreign Missions Act (FMA)
jurisdiction over location and construction of diplomatic missions, 659
Foreign Narcotics Kingpin Designation Act (1999), 220–21
Foreign Sovereign Immunities Act (FSIA) (1976), 549–629. *See also* Sovereign immunity
art immune from seizure and, 562–72
causes of action in cases brought under terrorism exception
federal law, 578, 589–90
common law, 590–91
Flatow Act against officials for acts covered by FSIA terrorist act exception, 589–90
Torture Victim Protection Act, 650–52
foreign law, 591-592
state law, 583–84, 591–92
default judgments, 581–84
definition of "foreign state," 550–61
agency or instrumentality of, 558–61, 612–21
core functions test, 558–61
foreign military, 618–19
organ of foreign state, 550–58
enforcement of contempt sanctions not available under, 603–11
exceptions to immunity, 572–603
arbitration agreements and confirmation of arbitral awards, 612–21
collection of judgments. *See* judgments, collection of, *this heading*
commercial activity, 572, 573–75, 620–21
expropriation claims, 558–61, 572–77
international agreements at time FSIA enacted, application only where express conflict with FSIA, 626
terrorist acts, 577–92
state sponsors of terrorism, applicable only to, 582
execution of judgments, 612–29
arbitration award, attachment of, 612–21
diplomatic and consular property and, 626–29
excusable neglect, 621–26
property in possession of third party, 564–72
fugitive disentitlement doctrine, 562*n*
government officials, common law immunity not replaced by FSIA for, 634–39
jus cogens violations, no exception to immunity for, 646–50

Foreign Sovereign Immunities Act (FSIA) (1976) (continued)
private right of action under, 578
retroactive application, 573
special missions immunity and, 680–81
tax issues and, 592–603
third party ability to assert immunity of Iranian art in its possession, 562–72
waiver
implied, 562–64
jus cogens violation. *See* exceptions to immunity, *this heading*
Forest conservation. *See* Environmental issues
***Forum non conveniens* doctrine,** 963–65
Fourth Amendment. *See* Constitution, U.S.
France
compliance with Hague abduction convention, 102
customary international law, specially affected state under, 1077–81
extradition and mutual legal assistance, 116, 117, 137, 146
Nazi era victims, claims of, 504–7
nonproliferation efforts
Iran and, 1274, 1277–78
Nuclear Terrorism, Global Initiative to Combat, 1295–96
nuclear fuel, assurances of reliable access to, 1292–93
peace process, involvement in
Darfur, 1051
Lebanon, 257, 1036*n*
rendition, use of, 161–62
Titanic protection agreement, 828–35
Fraud
immigration documents, 15, 51, 207–10
Free speech rights. *See also* Constitution, U.S. *subheading:* First Amendment
designation of terrorist organization as violation of, 198–99
incitement to commit terrorist acts, 200–210
UN Special Rapporteur on Freedom of Opinion and Expression, 486–87
Freedom of Information Act (FOIA)
Abu Ghraib photos, litigation concerning, 1213–23
Freedom of navigation. *See* Maritime issues, *subheading:* navigation rights
Fugitive disentitlement doctrine, 562*n*

G
G-8 countries
counterterrorism recommendations, 210
kleptocracy prevention, 234

Garnishment
dissolution of writs due to lack of jurisdiction, 562–64
Gender discrimination, 372–76
General Agreement on Tariffs and Trade (GATT)
EU–U.S. tariffs, 754–55
General Agreement on Trade in Services (GATS), 755–56
General Assembly, UN
Resolutions:
60/251, 328, 341
61/28, 1060
61/105, 881
61/106, 383
61/135, 1031
61/143, 375
61/146, 385–87
61/222, 805
61/1221, 379
3188, 656*n*
3199, 656*n*
Geneva Convention on law of war (1929), 1150–51
Geneva Convention III: on Prisoners of War (1949). *See also* Geneva Conventions on law of war (1949)
Afghanistan and, 1134
FOIA requests for Abu Ghraib photos, 1216
Iraq war (2003) and, 1133
military commissions and, 1153–54, 1170
POW status for terrorists contrary to provisions on, 1117
release and repatriation, 1184–94
Taliban and al Qaeda, applicability to armed conflict with, 1113, 1134
Geneva Convention IV: on Civilians (1949). *See also* Geneva Conventions on law of war (1949)
FOIA requests for Abu Ghraib photos, 1216
military commissions and, 1154
Geneva Conventions on law of war (1949). *See also specific Geneva Conventions*
additional protocols to, 1075
Additional Protocol I (international conflicts, 1977), 470–71, 1138
nuclear weapons and, 1078–84
Additional Protocol II (non-international conflicts, 1977), 1084
Additional Protocol III (additional distinctive emblem, 2005), 1100–1104
applicability to conflict with al Qaeda and Taliban, 1112, 1115, 1152–55, 1162, 1175

Geneva Conventions on law of war (1949) (continued)
common articles:
Article 2, 1113
Article 3
applicable to conflict with Al Qaeda and Taliban, 1112, 1115, 1152–55, 1162, 1175
grave breaches of, 1171–73, 1176
military commissions as violating, 1138–55
revised legislation and procedures to correct violations of, 1115, 1163–77
grave breaches and other violations of, 1171–73, 1176
Iraq war (2003) and, 1133
judicial enforceability of in U.S., 1150–51, 1162, 1170
treatment of detainees and, 1216–18
unlawful combatant status implicit in, 1132
war crimes legislation implementing in U.S., 1171–73, 1176
Genocide
claims
against Papua New Guinea, 442–43
against Sudan, 460–63
Darfur, U.S. conclusion re occurrence in, 422–23, 1048
ICC and, 258, 277
ICJ jurisdiction under Convention on Prevention and Punishment of, 1023
Iraq, 269
Germany
consular notification, claims against U.S. for failure of, 70–72
extradition and mutual legal assistance, 121–22, 137, 146, 148
immunity of foreign official for official acts, 641
missile defense and nonproliferation
Iran and, 1274–78
nuclear fuel, assurances of reliable access to, 1292–93
Nuclear Terrorism, Global Initiative to Combat, 1295–96
as occupied territory, 348, 1150, 1178, 1208
World War II-era claims against
interest on Foundation "Remembrance, Responsibility, and the Future" funds, 507–17
settlement from fund precluding litigation, 517–21
Good Friday Agreement (1998), 122–27
Greece
extradition and mutual legal assistance, 137, 146
Hague Child Abduction Convention, compliance with, 102

Guantanamo detainees. *See* Detainees, military
Guatemala
forest conservation agreement, 886–88
illicit drug production or transit, 213
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
money laundering, 243
Guyana
money laundering, 243

H
Habeas corpus. *See also* Detainees, military, *subheading*: habeas availability, litigation concerning Guantanamo detainees
Multinational Force-Iraq detainees, 1206
Hague Abduction Convention, 98–103
Hague Conference on Private International Law (HCCH), 105–6
Hague Conventions
Hague Conference on Private International Law, conventions adopted by. *See* Adoption; Children; Evidence
Industrial Designs, Hague Agreement Concerning the International Deposit of, 786–90
Securities Intermediaries, Hague Conference Convention on, 936–38
Haiti
illicit drug production or transit, 213, 215
Hamas
abduction of Israeli soldier, 1233–35
Palestinian Authority government, 990–95
terrorism and, 337, 990–95, 1227
Hariri, Rafik. *See* Lebanon
Hawaii
Northwestern Hawaiian Islands Marine National Monument, 872–75
Hazardous waste. *See also* Environmental issues
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 863–65
Head-of-state immunity
customary international law, 678
Hijacking. *See* Hostage-taking and hijacking
Himalaya Clause, 921, 923
Historical heritage
Native Hawaiian culture and history, Northwestern Hawaiian Islands Marine National Monument, 872–75
HIV. *See* AIDS/HIV
Holocaust claims
Foundation Remembrance, Responsibility and the Future Agreement between U.S. and Federal Republic of Germany, 507–21

Holocaust claims (continued)
Nazi era property confiscation. *See* World War II
Holy See
immunity, 684
Homeland Security, Department of (DHS)
airline passenger name record data for flights between U.S. and EU, 168–72
Appropriations Act of 2007, 9
verification of travel documents, 208–10
Honduras
Hague Child Abduction Convention, compliance with, 101
Inter-American Convention Against Corruption, party to, 238
Hostage-taking and hijacking
International Convention Against Hostage-taking, 585–87
private right of action against Iraq for U.S. hostages held under Hussein, 584–92
Human rights
Alien Tort Statute. *See* Alien Tort Statute (ATS)
civil rights, U.S. Justice Department division, 418
Commission on. *See* United Nations Commission on Human Rights
counterterrorism actions and, 487–88
Country Reports on Human Rights Practices, 327
crimes against humanity and ATS jurisdiction, 460–65
Darfur Peace and Accountability Act (2006), 978–83
detention, arbitrary, 429–30
disappearances, enforced or involuntary, 415, 424–30
Protection of All Persons from Enforced Disappearances, draft International Convention for, 424–28
discrimination. *See* Discrimination
extrajudicial killing, 465–76, 479–82
gender discrimination, 372–76
genocide. *See* Genocide
Global Internet Freedom Task Force, 769–70
Human Rights Council. *See* UN Human Rights Council
International Covenant on Civil and Political Rights. *See* International Covenant on Civil and Political Rights (ICCPR)
law of, distinct from humanitarian law/law of war, 347, 384, 1121–22
prisoners. *See* Prisoners and prisons
trafficking in persons. *See* Trafficking in persons
U.S. border control policy and, 210
U.S. programs and policies, 327
Working Group on, 428–29

Humanitarian law. *See also* Armed conflict; Geneva Conventions on law of war (1949); Law of war; War crimes
ICRC study on, 1069–85
humanitarian relief personnel, treatment of, 1076–77
opinio juris, 1073–75
state practice, 1071–73
Hungary
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 137, 147
Hague Child Abduction Convention, compliance with, 102
intellectual property rights Watch List, 768

I
ICC. *See* International Criminal Court (ICC)
Iceland
whaling convention, reservations to, 878–80
ICJ. *See* International Court of Justice (ICJ)
ICTR. *See* International Criminal Tribunal for Rwanda (ICTR)
ICTY. *See* International Criminal Tribunal for Former Yugoslavia (ICTY)
ILC. *See* International Law Commission (ILC)
Illegal Immigration Reform and Immigrant Responsibility Act (1996), 29–33, 36–39, 153
ILO. *See* International Labor Organization (ILO)
Immigration and Nationality Act (INA) (1952)
admissibility, determination of, 1191–93
definition of "aggravated felony," 34–35
Presidential Proclamation suspending entry by aliens (8015), 42–44
Sections:
101, 33–36, *55*, *56*, 1191–94
207, 55, *56*
212, 7, 18–29, 36–40, 42–43, 52, *55*
215, 6n, 7, 10*n*
217, 14
241, 29–33
Immigration and visas, 18–52. *See also* Citizenship; Illegal Immigration Reform and Immigrant Responsibility Act (1996); Immigration and Nationality Act (INA) (1952)
denial of visa due to material support to terrorist organization, 18–29
detention pending removal. *See* Detention of aliens, nonmilitary
false or fraudulent, 207–10
family reunification visas
Cuban migrants, 40–41
processing of Liberian refugees, 59–60

Immigration and visas (continued)
Immigration Fraud Conference, 209–10
migrants from Belarus, suspension of entry, 42–44
nonimmigrant visas and entry requirements, 6–7
parole
no authority for court to order Executive to parole alien into U.S., 1191–94
status of Cuban medical personnel, 41–42
reentry of alien illegal under retroactive application of Illegal Immigration Reform and Immigrant Responsibility Act, 29–33
refugees. *See* Refugees
retroactivity of immigration laws, 29–33, 36–39
Secure Fence Act of 2006, 50–52
statelessness, 1–2
terrorism and
incitement to commit terrorist acts, 206–10
material support to terrorist organization, 18–29
visas
G-2 visas, 657
waiver program, 207, 209
Immunity. *See also* Consular offices and personnel; Diplomatic Relations, Vienna Convention on; Foreign Sovereign Immunities Act (FSIA) (1976); Head-of-state immunity; Sovereign immunity
of government officials, 630–43
Holy See, 684
special missions immunity, 662–81
Torture Victim Protection Act and, 629, 650–52, 681*n*
UN personnel. *See* Privileges and Immunities of the United Nations (General Convention)
IMO (International Maritime Organization). *See* Maritime issues
IMSO (International Mobile Satellite Organization), 494–97
***In vitro* conception**
citizenship of child conceived *in vitro,* 2–3
INA. *See* Immigration and Nationality Act (INA) (1952)
India
Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), WTO action concerning, 707
illicit drug production or transit, 213
intellectual property rights Watch List, 768
ITER International Fusion Energy Organization, 893
nonproliferation. *See* Nonproliferation, *subheading*: country-specific issues
UN mission's liability for local property taxes, 592–603
Indigenous people
removal of indigenous persons from Chagos Archipelago to allow establishment of U.S. military facility in Indian Ocean, 455–59
rights of, UN Declaration on, 394–401

Indonesia
intellectual property rights Watch List, 768, 769
logging initiative, 801–3
Straits of Malacca and Singapore, 806–10
Industrial designs. *See* Hague Conventions
Influenza
pandemic influenza, national strategy for, 889–90
Injunctions
anti-suit injunctions, 953–63
Intellectual property rights
industrial designs, Hague Convention, 786–90
Special 301 program (Watch List), 766–69
Intelligence and surveillance
Terrorist Surveillance Program, 363–65
Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)
information sharing, 171
travel document requirements, 4, 7–9
treaty issues, 297
Western Hemisphere Travel Initiative and, 4–11
statutory and regulatory history, 9–11
Inter-American Convention Against Corruption (1996), 236, 237–38
Inter-American Convention on Serving Criminal Sentences Abroad, 104
Inter-American Court of Human Rights, 434, 645*n*
Inter-American Drug Abuse Control Commission (CICAD), 220
Inter-country adoption. *See* Adoption
International Coffee Organization, 493–94
International Court of Justice (ICJ), 1021–26
case against U.S. for attack on Iranian oil platforms, 1025
decisions by not binding in U.S. courts, 71–72
Israel's construction of wall in Palestinian Territory, 1023
nuclear weapons advisory opinion, 1079, 1081, 1255–57
on state practice, 1072*n*
U.S. support for, 1021–26
U.S. withdrawal from compulsory jurisdiction and consular optional protocol, 1026
International Covenant on Civil and Political Rights (ICCPR)
free speech rights and, 200–202
military detainees and, 1122
nonderogability of certain provisions, 1122
territorial scope of, 346–50
U.S. disagreement with ICJ on, 1024, 1121

International Covenant on Civil and Political Rights (ICCPR) (continued)
tribal self-determination, 351–54
UN Human Rights Committee, 284–87, 346–71
Committee suggestions and recommendations, 346–50
responses to Committee questions, 350–71
U.S. ratification and implementation of, 210, 284–87, 346–71
International Criminal Court (ICC)
American Servicemembers' Protection Act and, 278
Article 98 agreement (nonsurrender of Americans to ICC), 279
Darfur, referral to, 258
jurisdiction, 257–58
Rome Statute, U.S. views on, 257, 277
UN Security Council and, 258
U.S. policy, 257–58, 277–79
International Criminal Tribunal for Former Yugoslavia (ICTY), 259–69
authority to compel evidence from SFOR, 259–69
establishment of, Security Council authority for, 255
U.S. views on and support for, 255–56
International Criminal Tribunal for Rwanda (ICTR)
establishment of, Security Council authority for, 255
U.S. views on and support for, 255–56
International Emergency Economic Powers Act. *See* Emergency Economic Powers Act, International (IEEPA)
International Fusion Energy Organization, 893–95
International Institute for the Unification of Private Law (UNIDROIT)
on interests in mobile equipment, 930–34
International Labor Organization (ILO)
on forced labor, 227
on maritime labor, 821–25
fair treatment of seafarers in event of maritime accident, 825–28
International Law Commission (ILC)
draft articles
on diplomatic protection, 499–502
on jurisdictional immunities of states and their properties, 608
on extradite or prosecute obligation, 159–60
on *jus cogens,* 647*n*
on reservations to treaties and objections to reservations, 294
on responsibility of international organizations, 491–92
on transboundary harm arising from hazardous activities, 861–62
International Maritime Organization (IMO). *See* Maritime issues
International Military Tribunal at Nuremberg, 649
International Mobile Satellite Organization (IMSO), 494–97

International organizations. *See also specific organization*
immunity
of African Union, 684
of Holy See, 684
Immunities Act, 683–84
of Radio Regulations Board, 682–84
responsibility of, 491–92
International Telecommunications Union (ITU)
amendments to Constitution and Convention, 770–74
radio regulations, 682–84, 772–73
International Thermonuclear Experimental Reactor Consortium (ITER)
International Fusion Energy Organization, 893–95
Internet
Global Internet Freedom Task Force, 769–70
website designated as foreign terrorist organization, 191–99
Interpol, 209
Inviolability. *See also* Consular offices and personnel; Diplomatic missions and personnel; Foreign Sovereign Immunities Act (FSIA) (1976); Head-of-state immunity; Immunity
of foreign dignitaries attending UN conference, 681–82
of heads of state to service of process, 681–82
Iran
attachment of property in U.S., 562–72
Bank Saderat, cutting off from U.S. financial system, 986–90
claims arising from bombing of U.S. military base in Saudi Arabia, 581–84
claims at ICJ arising from destruction of oil platforms, 1025
educational exchange program, 989–90
human rights violations
religious freedom violations, 377
U.S. policy on support of Iranian people, 989–90
Iranian Transactions Regulations, 986–90
trafficking in persons, 228
nonproliferation. *See* Nonproliferation, *subheading*: country-specific issues
terrorism and
noncooperation with antiterrorism efforts, 172
support for in Lebanon, 1037, 1039–41, 1226–30, 1233–34
trafficking in persons, 228
Treaty of Amity, Economic Relations, and Consular Rights Between U.S. and Iran (1957), 1023, 1025
Iraq
claims against, arising from hostage taking by Hussein government, 584–92

Iraq (continued)
Coalition Provisional Authority (CPA)
case concerning false claims submitted to, 301–5
whether instrumentality of U.S. for purposes of False Claims Act, 301–5
designation as state sponsor of terrorism rescinded, 177, 179–80
detainees. *See* Detainees, military
Development Fund for, protection of, 1235–38
Iraqi High Tribunal, 259, 269–72
Multinational Force in. *See* Multinational Force in Iraq
sanctions, travel-related, 1015–19
UN Security Council Resolutions related to, 1235–38
Ireland
extradition and mutual legal assistance, 137, 147
Ireland, Northern
extradition treaty with U.S. by Great Britain and, 117–18
IRTPA. *See* Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)
Israel. *See also* Middle East Conflict, Israeli-Palestinian
abduction of Israeli soldier, U.S. position on, 1233–35
intellectual property rights Watch List, 768
Lebanon, conflict with Hezbollah in, 1034–42, 1225–33
Lebanon Ceasefire Understanding (1996), 1035*n*
Magen David Adom, 1101, 1103–4
record of place of birth for U.S. passport, 530–47
U.S. policy on status of Jerusalem, 530–47
Italy
cultural protection agreement, 897, 901
extradition and mutual legal assistance, 137, 147
intellectual property rights Watch List, 768
Nuclear Terrorism, Global Initiative to Combat, 1295–96

J
Jackson-Vanik Amendment, 746–47*n*
Jamaica
illicit drug production or transit, 213
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
Japan
anti-suit injunction, 958–63
extradition and mutual legal assistance, 148
ITER International Fusion Energy Organization, 893
most-favored-nation status, 755
Nuclear Terrorism, Global Initiative to Combat, 1295–96
Special Measures Law Concerning U.S. Antidumping Act of 1916, 959

Jerusalem, status of, 530–47
Jordan
parental access to children, MOU on cooperation with U.S., 103
Judicial assistance. *See also* Evidence; Service of process abroad
antitrust case and gathering of evidence, 969–70
apostille. *See* Apostille
U.S.–Russia agreements, 107–10
Jurisdiction
Act of Mar. 3, 1875 as conferring, 84
comity principle and, 945–46
extradition, U.S.–UK treaty on, 119–20
immunity. *See* Immunity
maritime accidents in international waters, investigation of, 825–28
nonjusticiable political issues, 322–24
Jus cogens
Alien Tort Statute claims, 436, 442, 445
definition, 647*n*
nonderogable provisions of ICCPR as distinct from, 1122
violation of
no exception to immunity under FSIA, 646–50, 678, 680–81
torture as, 1122

K
Kazakhstan
asylum seekers returned to Uzbekistan by, 60–61
intellectual property rights, 769
Nuclear Terrorism, Global Initiative to Combat, 1295–96
strategic offensive arms agreements, 1252
Kenya
bombing of U.S. embassy in, claims related to, 578–81
U.S. defense relationship, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Kleptocracy, 234–36
Korea, North (Democratic People's Republic of Korea (DPRK))
antiterrorism efforts, noncooperation with, 172
arms control and nonproliferation, 1265–72. *See also* Nonproliferation, *subheading*: country-specific issues
ballistic missiles, launch of, 1265–68
biological weapons, 1240
nuclear test and resulting sanctions, 1268–70
six-party talks, 1271–72

Korea, North (Democratic People's Republic of Korea (DPRK)) (continued)
drug trade, 215
human rights violations
North Korean Human Rights Act of 2004, 57–59
religious freedom violations, 377
refugees from, 56–59
trade restrictions and embargo, 1269–70, 1299–11300
trafficking in persons, 228
Korea, South (Republic of Korea (ROK))
intellectual property rights Watch List, 768
ITER International Fusion Energy Organization, 893
nonproliferation, 1271–72
trade issues, 766
WTO complaint related to Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), 707
Ku Klux Klan Act of 1871, 82–83
Kuwait
claims arising from Iraq invasion and occupation of, 584–92
intellectual property rights Watch List, 768, 769
Kyrgyzstan
asylum seekers returned to Uzbekistan by, 60–61

L
Labor issues
Guidelines for Fair Treatment of Seafarers, 825–28
Maritime Labor Convention (2006), 821–25
Landmines. *See* Arms control
Laos
drug trade, 213
money laundering, 243
trafficking in persons, 229
Latvia
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 127, 137, 138–39, 147
intellectual property rights Watch List, 768, 769
money laundering
Multibanks, 253
VEF Banka, 249–52
Law enforcement. *See also* Crime; Extradition; Jurisdiction; Mutual legal assistance
arbitrary detention, 429–30
counternarcotics cooperation in, 212
Europol–U.S. agreement on transfer of personal data, 164
military use of force vs., against terrorists, 1105, 1111–12

Law of the Sea, UN Convention on (UNCLOS)
exclusive economic zone, 817–18
navigational freedom, 805–15
Arctic Northwest Passage, 814–15
Australian compulsory pilotage scheme for Torres Strait, 810–12
straits, 806–12
Swedish territorial waters, innocent right of passage, 812–14
territorial sea and baselines, right of innocent passage in, 812–14
violation of, as basis for ATS claim, 433, 436, 442
Law of war. *See also* Geneva Conventions on law of war (1949); Hague Conventions; War crimes; War on Terror
customary international law, 1069–85
International Committee of the Red Cross study on, 1069–85
opinio juris, 1073–75
state practice, 1071–73
developments in, 1105
environment, protection of, 1105
exploding bullets, use of, 1085
human rights law distinct from, 347, 384, 1121–22
humanitarian workers, protection in, 1076–77
international organizations and right of self-defense, 492
law enforcement vs., against terrorists, 1105, 1111–12
riot-control agents, 1223–25
use of force in response to September 11, 2001 attacks
against al Qaeda in states harboring, 1109–10
right of self-defense, international recognition of, 1106–7, 1108–10, 1121
Lebanon
Gemayel assassination, 1041
Hariri murder
Syria and, 984–86, 1041
tribunal established, 272–75, 1041
UN Security Council Resolutions related to
1559, calling for withdrawal of all foreign forces from Lebanon, 1037–38, 1041, 1226–30
1636, sanctions under Chapter VII, 985
1664, Hariri tribunal, 272–75
intellectual property rights Watch List, 768
Interim Force in Lebanon (UNIFIL), 1035, 1037, 1039, 1060–61
Israeli firing on observers with, 1230
Israel-Lebanon Ceasefire Understanding (1996), 1035*n*
Israel vs. Hezbollah conflict in, 1034–42, 1225–33
ceasefire and subsequent peacekeeping efforts, 1039–42

Lebanon (continued)
Israel vs. Hezbollah conflict in (continued)
Human Rights Council special session on, 338–41
Syria and Iran, roles in, 1040–42, 1227
UN Security Council Resolution 1701 calling for ceasefire, 1034–41, 1233
embargo under, 1035, 1037, 1039–40
use of force issues, 103, 1226, 1230–33
Rome Conference, 1228–29
Lesotho
Article 98 agreement and, 278
waivers to prohibition on assistance, 278
Letters rogatory, 107–10, 966*n*
Liberia
former President Charles Taylor, 256–57, 275–77, 422
refugee admissions for family reunification, 59–60
Libya
embassy opening, 527–28
terrorism and
state sponsor of terrorism, rescission of designation as,
Export Administration Regulations to implement, 177–79
Presidential Determination (2006–14), 173–77
U.S. relations with, 527–28
Lithuania
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 137, 147
intellectual property rights Watch List, 768
Lumber
Indonesia logging initiative, 801–3
softwood lumber
agreement with Canada, 762–63
WTO claim brought against U.S., 745
Luxembourg
extradition and mutual legal assistance, 137, 147

M
Magen David Adom (Israeli aid society), 1101, 1103–4
Maintenance obligations
child support and other maintenance obligations
denial of passport for nonpayment of, 15–16
reciprocal arrangements for enforcement of, 942–44
Recovery of Child Support and Other Forms of Family Maintenance, draft Convention for the International, 938–42

Malaysia
extradition and mutual legal assistance, 147–48
intellectual property rights Watch List, 768
Straits of Malacca and Singapore, 806–10
trade issues, 766
Mali
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Malta
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 127, 137, 138–39, 147
U.S. military assistance, 278
Man-portable air defense systems (MANPADS), 210–11
Marine conservation. *See also* Fish and marine mammals
Northwestern Hawaiian Islands Marine National Monument, 872–75
pollution from ships, transboundary water pollution, 855–59
Maritime issues. *See also* Environmental issues; Fish and marine mammals; Law of the Sea, UN Convention on (UNCLOS)
accidents in international waters, guidelines for fair treatment of seafarers in, 825–28
Arctic boundaries, Canadian claims in, 814–15
Continental Shelf, Commission on the Limits of, 806
Dubai Ports World proposal to acquire U.S. ports, 774–80
Global Maritime Distress and Safety System, 496–97
hazardous materials, Basel convention on transport of, 863–65
interdiction for law enforcement purposes, 836–40
International Maritime Organization (IMO)
Athens Protocol (2002), 292–94
Maritime Safety Committee, 496–97, 835
recycling of ships, 864
Wreck Removal, draft Convention on, 815–21
labor sector, Maritime Labor Convention (2006), 821–25
Long Range Identification and Tracking of Ships, 494–96, 835–38
navigation rights, 806
UN Convention on the Law of the Sea, 806
passport cards for sea travel to enter and depart U.S., 11–13
preemption of state law by federal U.S. authority, 904
Safety of Life at Sea, International Convention on, 497, 835–38
salvage at sea, 828–35
Titanic salvage, 828–35
wrecks, authority over, 818–19

Maritime issues (continued)
Security and Accountability for Every Port Act (2006), 305
straits
compulsory pilotage scheme for Torres Strait, 810–12
Malacca and Singapore Straits, security of, 806–10
Northwest Passage, 814–15
Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Convention for (1988) and fixed platform 2005 protocols, 211–12
territorial sea
innocent passage through, right of, 812–14
wrecks, authority over, 818–19
whaling. *See* Fish and marine mammals
Wreck Removal, draft Convention on, 815–21
Marshall Islands
Nuclear Claims Tribunal award, litigation against U.S. concerning, 316–25
Mauritius
Hague Child Abduction Convention, compliance with, 101
trade and investment issues, 759–60
Memoranda of understanding
Jordan–U.S. cooperation on parental access to children, 103
lost or stolen passports, U.S.–New Zealand MOU, 17
Methamphetamine. *See* Drug trade
Methyl bromide
amendment of EPA regulations to allow production for critical uses, 866–71
Mexico. *See also* North American Free Trade Agreement (NAFTA)
border issues
air travel and passport requirements, 4–9
counterterrorism cooperation, 210
passport cards for pedestrian, vehicular traffic, and sea travel, 11–13
Secure Fence Act of 2006, 50–52
cement trade, 758–59
consular notification, 86-88, 1023
drug trade, 213, 218
Hague Child Abduction Convention, compliance with, 102
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
tequila trade, 757–58
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279

Micronesia
Compact of Free Association between U.S. and (1986), 318–20
trusteeship termination, 318
Middle East Conflict, Israeli-Palestinian
abduction of Israeli soldier, U.S. position on, 1233–35
Human Rights Council special sessions on, 335–38
ICJ advisory opinion on Israel's construction of wall in Palestinian Territory (2004), 1023–24
Palestinian Anti-Terrorism Act (2006), 306, 993–95
Quartet (U.S., EU, Russia and UN) peace efforts, 1028–32
Roadmap to two-state solution, 1027
two-state solution, statements by President Bush on, 1026–28
Migration and Refugee Assistance Act of 1962, 55, 56
Military activities. *See also* Armed conflict; Arms control; Detainees, military; Law of war; Peacekeeping missions; Prisoners of war
Army Field Manual, 1164–68
disproportionate use of military force, 465–76
military assistance, 278–79
Uniform Code of Military Justice. *See* Uniform Code of Military Justice (UCMJ)
use of lasers, 1093–94
war powers. *See* President, U.S.
Military commissions for trial of certain non-U.S. enemy combatants, 1115, 1138–77
Military Commissions Act (2006), 1104, 1156, 1160–63, 1168–77, 1179–83
presidential authority to convene, 1144–54
presidential military order establishing, 1139–40
procedures, instructions and appointments for
appellate procedure, 1169–70, 1175
military courts martial and, 1146–50
Supreme Court decision invalidating for violations of UCMJ and Geneva Conventions, 1144–51
war crimes, jurisdiction over, 1115, 1160, 1162, 1169, 1171–74, 1176, 1182
Mining
gold mining and NAFTA Chapter 11 disputes, 709–26
Mobile Equipment, Cape Town Convention on International Interests in (2001)
Protocol for Space Equipment, 931–34
Monaco
diplomatic relations, 528

Money laundering, 241–54
designation of countries and financial institutions involved in, 241–49
Financial Action Task Force (FATF) to combat, 999
Financial Crimes Enforcement Network (FinCEN), 141, 243–53
Mongolia
UN mission's liability for local property taxes, 592–603
Montenegro
diplomatic relations, 529
status of, 528–29
Montreal Protocol on Substances That Deplete the Ozone Layer (1987)
amendments to, 866–71
Morocco
free trade agreement, 766
Nuclear Terrorism, Global Initiative to Combat, 1295–96
Most-favored-nation status. *See* Trade
Multinational Force in Iraq, 1235–38
cases by U.S. citizens seeking protection from transfer by to Iraqi custody, 1194–1213
detention by, whether constitutes detention in U.S. custody, 1194–1202, 1207–13
Mutual legal assistance. *See also* Law enforcement
in criminal matters, 108
evidence, use of information by requesting state as, 144–45
joint investigative teams, 142–44
treaties (MLATs)
European Union–U.S., 139–47
bilateral implementing instruments with EU member states, 146–47
territorial application, 145–46
Germany–U.S., 148
Japan–U.S., 148
Malaysia–U.S., 147–48
video-conferencing, 144

N
Namibia
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Narcotrafficking. *See* Drug trade
National Counterterrorism Center (NCTC), 167
National Emergencies Act (1976), 975, 984
National security, U.S.
Committee on Foreign Investment in U.S. (CFIUS), 774–80

National security, U.S. (continued)
National Security Letters, use of, 362–63
Terrorist Surveillance Program, 363–65
wiretaps, 363–65
Nationality. *See also* Citizenship; Immigration and visas
statelessness, 1–2
Native Americans
California Sacred Sites Act (1976), 714
tribal self-determination, 351–54
Natural resources. *See* Environmental issues; Fish and marine mammals
Nauru
money laundering in, 243
Nazi era property confiscation claims. *See* Holocaust; World War II
NCTC (National Counterterrorism Center), 167
Netherlands
extradition and mutual legal assistance, 136, 137, 147
Immigration Advisory Program at airports, 209
nuclear fuel, assurances of reliable access to, 1292–93
New York City
property taxes on UN missions, 592–603
New Zealand
indigenous peoples, UN declaration on, 394–401
Regional Movement Alert List pilot, 209
stolen and lost passport data exchange agreement with U.S., 17
Nicaragua
Inter-American Convention Against Corruption, party to, 238
Niger
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Nigeria
human rights violations, judicial adequacy, 483–84
illicit drug production or transit, 213, 215
TVPA claims, exhaustion requirement, 482–84
Non-inquiry, rule of, 1203–04. *See also* Extradition
Nonproliferation, 1255–1301. *See also* Arms control; Atomic Energy Agency, International (IAEA); Biological weapons; Chemical weapons; Nuclear Non-Proliferation Treaty (NPT) (1968); Nuclear weapons, use of; Strategic Arms Reduction Treaty (START)
country-specific issues
Cuba, 1298–99
India, 1284–87, 1298–99
Henry J. Hyde United States and India Nuclear Cooperation Promotion Act (2006), 1284–87

Nonproliferation (continued)
country-specific issues (continued)
Iran
IAEA report of situation to Security Council and subsequent actions, 1272–84
Nonproliferation Act, 1298–99
North Korea
missile proliferation sanctions against, 1265–68
nuclear detonation and resulting U.S. sanctions, 1268–71
sanctions on North Korean companies for transfers to Iran, 1298–99
six-party talks, 1271–72
Russia, 1298–99
South Korea in six-party talks, 1271–72
Fissile Material Cut Off Treaty (FMCT), 1289–91
nuclear fuel, assurances of reliable access to, 1292
Proliferation Security Initiative (PSI), 1288–89
terrorism and. *See* Terrorism
U.S. views and priorities, 1255–65
Wassenaar Arrangement, 1300–1301
North American Free Trade Agreement (NAFTA)
binational panel review provisions, constitutional challenge to, 726–37
Chapter 11 disputes, 688–726
actions of local governments and, 689
antidumping and countervailing duties, Chapter 19 and, 702–9, 727, 734
claims against U.S., 688–701
customary international law, Article 1105(1) as incorporating, 721–26
expropriation, 695, 709–26
jurisdiction
Canadian investors' claims where all investments are in Canada, 693–701
consent to arbitrate, 694
considerations in determining, 703–4
time bar, when triggered, 688–93
minimum standard of treatment principles, 724
national treatment requirements, 693, 695, 698–701
Chapter 19 disputes, 702
Extraordinary Challenge Committee (ECC), 728
Free Trade Commission Joint Statement (2006), 686–88
Implementation Act (1993), 708, 726, 727
rules of origin, Presidential Proclamation 8067 modifying, 688

North American Free Trade Agreement (NAFTA) (continued)
Working Group on Rules of Origin, 688
Articles:
4, 689*n*
5, 689*n*
102, 696
1101, 694–96, 698–99, 701, 704
1102, 693, 695, 699–700, 709
1105, 695, 710, 720–26
1110, 695, 710, 717, 721–22
1116, 689, 692–93, 704
1117, 688–89, 690, 692–93, 704
1118, 704
1119, 704
1120, 704
1121, 699, 704
1128, 697*n*
1139, 699
1901, 702, 704–6, 709
1902, 705, 707, 708, 709
1903, 705, 707
1904, 728
1911, 709
North Korea. *See* Korea, North (Democratic People's Republic of Korea (DPRK))
Northern Mariana Islands, Commonwealth of (CNMI)
control of submerged lands, 315–16
NPT. *See* Nuclear Non-Proliferation Treaty (NPT) (1968)
Nuclear Claims Tribunal, 316–25
Nuclear energy
ITER International Fusion Energy Organization, 893–95
nuclear fuel, assurances of reliable access to, 1292–93
Nuclear Non-Proliferation Treaty (NPT) (1968)
compliance and implementation, 1262–65
disarmament obligations, 1257–60
North Korea and, 1266, 1268
review conferences, 1260–61
Nuclear nonproliferation. *See* Nonproliferation
Nuclear weapons, use of. *See also* Nuclear Non-Proliferation Treaty (NPT) (1968)
ICJ advisory opinion on legality of use of, 1079–80
Geneva Convention Additional Protocol I not applicable to, 1079–80
no ban on use or deterrence under customary international law, 1255–57, 1263

O
Oceans. *See* Fish and marine mammals; Law of the Sea, UN Convention on (UNCLOS); Maritime issues
Office of Foreign Assets Control (OFAC)
Cuban litigation against over trademark denial, 1006–15
Iranian Transactions Regulations, 986–90
Iraqi Sanctions Regulations, 1016–17
Palestinian Authority government under Hamas, 990–95
Oman
free trade agreement with U.S., 765–66
Organization of American States (OAS)
Inter-American Convention on Serving Criminal Sentences Abroad, 104
Outer space. *See* Space
Ozone protection. *See* Air pollution

P
Pakistan
illicit drug production or transit, 213
immunity, Pakistan State Immunity Ordinance, 609
intellectual property rights Watch List, 768, 769
service of process, 970–73
Palestine Red Crescent Society, 1104
Palestinian issues. *See also* Middle East Conflict, Israeli-Palestinian
Palestinian Anti-Terrorism Act (2006), 306, 993–95
Palestinian Authority
Legislative Council elections, Quartet comments on, 1028–32
sanctions against, 990–95
UN issues, 1032–42
Panama
free trade agreement, 765
Hague Child Abduction Convention, compliance with, 102
illicit drug production or transit, 213
Inter-American Convention Against Corruption, party to, 238
Pandemic influenza, national strategy for, 889–90
Papua New Guinea
citizens' claim against international corporation under Alien Tort Statute, 431–36
human rights in, 946–50
Paraguay
forest conservation agreement, 886–88
illicit drug production or transit, 213
intellectual property rights, Section 306 monitoring, 769
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278

Paraguay (continued)
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Passports, U.S., 4–17
card format passports, 11–13
denial or revocation of
for foreign criminal charges, 16–17
for nonpayment of child support, 15–16
electronic, 13–15, 208
lost or stolen, U.S.–New Zealand memorandum of understanding on, 17
place of birth, designation of, 530–47
Regional Movement Alert List pilot, 209
sovereign immunity and, 307
U.S. policy regarding Jerusalem as place of birth on, 530–47
Western Hemisphere Travel Initiative, 4–13
Patent law. *See also* Intellectual property rights
Patent Cooperation Treaty (1970), 783
Patent Law Treaty (2000), 780–86
PATRIOT Act, USA (2001), 206, 243, 361–63
PATRIOT Improvement and Reauthorization Act, USA (2006)
methamphetamine production and trafficking, 216
search warrants, 362
Peacekeeping missions. *See also* Conflict resolution; United Nations
Lebanon, 1035, 1037, 1039, 1060–61
sexual exploitation and abuse at hands of UN peacekeepers, 1065–68
Somalia humanitarian relief operation, 1061–64
Sudan, 1047–54
Western Sahara, 1064–65
Peru
illicit drug production or transit, 213
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Philippines
intellectual property rights Watch List, 768, 769
Poland
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 137, 147
Hague Child Abduction Convention, compliance with, 102
Immigration Advisory Program at airports, 209
intellectual property rights Watch List, 768
Ministry of Treasury, takings exception to FSIA, 558–61, 572–77

Portugal
extradition and mutual legal assistance, 137, 147
President, U.S. *See also* Executive Branch; Executive Orders, Presidential; Presidential Determinations, Memoranda and Directives
authority to receive foreign emissaries, 668
special missions immunity and, 678–80
foreign affairs authority, 540–42
recognition, exclusive presidential authority, 540–42
signing statements, 305–7, 402, 536–37, 1286–87
war powers and commander-in-chief, 522–26
Presidential Determinations, Memoranda and Directives
Presidential Determinations
designation of drug-transit and drug-producing countries (2006-24), 212–13
implementing ICJ *Avena* decision, 87, 1026
Libya rescinded as state sponsor of terrorism (2006–14), 173–77
North Korea sanctions (2007-7), 1271
refugee admission numbers and authorizations for fiscal 2007 (2007–1), 55–56
trafficking in persons (2006-25), 228–29
waivers of prohibition on military assistance, 278
Presidential Proclamations
Bahrain free trade agreement (8039), 765–66
Northwestern Hawaiian Islands Marine National Monument (8031), 872–75
Ukraine trade relations (7995), 748
Vietnam trade relations (8096), 749–50
signing statements. *See* President, U.S.
Prisoner transfer, 104–5. *See also* Extradition
treaties for serving of sentence abroad
Council of Europe Convention on Transfer of Sentenced Persons, 104–5
Inter-American Convention on Serving Criminal Sentences Abroad, 104
Prisoners and prisons. *See also* Prisoner transfer
in foreign custody, Inter-American Convention on Serving Criminal Sentences Abroad. *See* Prisoner transfer
in U.S., rights of juveniles, 366–69
Prisoners of war. *See also* Detainees, military; Geneva Convention III: on Prisoners of War (1949)
protection from against insults and public curiosity, applicability to photographs of, 1216–18

Privacy rights
Eurojust–U.S. agreement on transfer of personal data in criminal prosecution, 165–67
Private international law. *See also specific topics*
commercial law, 903–38
family law, 938–44
harmonization efforts, 903–4
international civil litigation, 944–73
U.S. approach to, 905–9
Private rights of action under international instruments
Vienna Convention on Consular Relations, 76, 84–85
Privileges and Immunities of the United Nations (General Convention)
visiting foreign officials, 653, 655–57, 682
Procedural default doctrine, 64, 70
Property rights
tax exemptions for diplomatic missions, 592–603, 659*n*
Public health
AIDS/HIV, 1058, 1066–67
disease prevention initiatives, 891–92
International Health Regulations, 891–92
pandemic influenza, national strategy for, 889–90
Puerto Rico
political status, 311–15

R
Racial discrimination, 371–72
Alien Tort Statute jurisdiction, 946–50
Elimination of All Forms of Racial Discrimination, International Convention on, 371–72, 400
REAL ID Act, 155, 206, 1194
Red Cross, International Committee of (ICRC)
access to military detainees, 1125, 1127, 1161
additional distinctive emblem under Geneva Conventions, Protocol III, 1100–1104
Israeli and Palestinian organizations admitted to Red Cross and Red Crescent movement, 1103–4
communications, confidentiality of, 1127, 1219–20
humanitarian law, customary law of, study, 1069–85
Refugees, 52–60. *See also* Deportation; Removal of aliens from U.S.
admission numbers and authorizations for fiscal 2007 (Presidential Determination 2007–1), 55–56
Burmese refugees, resettlement of, 52–55
Liberian family reunification processing, 59–60
North Korean, 56–59

Registration of Objects Launched into Outer Space. *See* Space
Religion and religious freedom
discrimination or persecution, 198–99
International Covenant on Civil and Political Rights (ICCPR) and, 380
International Religious Freedom Act of 1998 (IRF Act), designation of countries of particular concern, 377
Religious Freedom Restoration Act of 1993 (RFRA), 222
religious use of controlled substances, 221–25
repression of Falun Gong movement in China, 663, 664
UN General Assembly resolution, 379–80
UN Human Rights Council, 380–81
U.S. Report on International Religious Freedom, 376–78
Remedies. *See also* State responsibility
in Convention on Jurisdictional Immunities of States and Their Properties, 599–600, 603, 607–9
exhaustion of remedies, requirement for
local, 501–2
under Torture Victim Protection Act, 482–84
wrecks at sea, under customary international law, 819–21
Removal of aliens from U.S. *See also* Extradition; Rendition; Torture
appeals, 414
continued detention of unadmitted alien while awaiting removal, 45–50
criminal aliens, 33–36
illegal reentry after, 29–33
torture allegations in proceedings for, 413–14
Rendition, 160–63, 414–15
disclosure of state secrets, 163
of Guantanamo detainees, 1123
Restatement (Second) of Foreign Relations, 595
Restatement (Third) of Foreign Relations, 66, 676, 948–49
Retroactivity
of immigration law. *See* Immigration and visas
Revised Statutes of 1874, 82–83
ROK. *See* Korea, South (Republic of Korea (ROK))
Romania
extradition and mutual legal assistance, 148–55
Hague Child Abduction Convention, compliance with, 102
intellectual property rights Watch List, 768
Russia
accession process to WTO, 751–52
agreements with U.S. *See also* Stategic Areas Reduction Treaty (START)
Cooperative Threat Reduction Umbrella Agreement, 1287–88

Russia (continued)
agreements with U.S. (continued)
U.S.–Russia market access agreement, 751–52
immunity for diplomatic agent, 653–57
immunity for U.S. foreign service officer in, 308–11
intellectual property rights Watch List, 768
ITER International Fusion Energy Organization, 893
letters rogatory on judicial assistance, 107–10
nuclear weapons and material and nonproliferation, 1298–99
Global Initiative to Combat Nuclear Terrorism, 1293–96
nuclear fuel, assurances of reliable access to, 1292–93
START and, 1253–54

S
Safety of Life at Sea, International Convention on. *See* Maritime issues
St. Kitts and Nevis
Article 98 agreement and, 278
Inter-American Convention Against Corruption, party to, 238
money laundering, 243
St. Vincent and the Grenadines
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
Salvage at sea. *See* Maritime issues
Samoa
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
San Marino
diplomatic relations, 529–30
Sanctions. *See also* Emergency Economic Powers Act, International (IEEPA); Executive Orders, Presidential; Nonproliferation; Terrorism; *specific countries*
contempt sanctions against foreign state under FSIA, 603–11
Executive Branch authority, 796–801, 1006–19
against international drug trafficking countries, 217
MANPADS transfer to state-sponsors of terrorism, 210–11
terrorism-related, UN delisting procedures, 1000–1006
Saudi Arabia
intellectual property rights Watch List, 768, 769
religious freedom violations, 377
terrorist attack on U.S. personnel in, claims in U.S. court against Iran for, 581–84
trafficking in persons, 229

Sea turtle protection. *See* Fish and marine mammals
Searches
PATRIOT Act, USA (2005) and, 361–63
Section 1983 actions
Vienna Convention and, 82–85
Secure Fence Act of 2006, 50–52
Securities intermediaries. *See* Hague Conventions
Security Council, UN. *See also* Law of war; Nonproliferation; United Nations, *subheading:* Charter of (1945); *specific countries*
Palestinian-Israeli conflict, 1032–33
Presidential Statements
on Darfur, 1053–54
on Iranian nuclear situation, 1274–76
on Israeli use of force in Lebanon, 1230–32
on terrorism sanctions, 1000–1003
reform of, 489–90
terrorism committees, 999–1000
terrorism sanctions, review of 1267, 1373 and 1540 Committees, 1002–3
Resolutions:
255, 1262
425, 1038, 1226, 1228
661, 1016
666, 1016
688, 1059
733, 1064
751, 1064
827, 263
1177, 1056
1267, 206, 999, 1000–1003
1308, 1066
1333, 1003
1373, 999, 1295
1390, 1003
1430, 1056
1452, 1001, 1005
1466, 1056
1526, 1004
1540, 1241, 1242, 1267, 1294
1546, 1194, 1199, 1200, 1235, 1236
1556, 1047
1558, 1064
1559, 1037, 1038, 1041, 1226, 1228–29, 1230
1572, 995
1583, 1226

Security Council, UN (continued)
Resolutions: (continued)
1590, 1047
1591, 975, 976
1596, 997
1617, 1004, 1005
1624, 199–210, 999
1636, 985
1638, 276
1649, 997
1655, 1226
1661, 1057
1664, 272–75
1672, 975–76, 1054
1679, 1043
1680, 1037, 1038, 1226, 1228
1686, 272
1688, 275–77
1695, 1265, 1266, 1269
1696, 1278–80
1697, 1060
1698, 997
1701, 1034–42, 1060–61, 1233
1706, 423, 1047–54
1709, 1048
1718, 1268, 1271
1720, 1064
1723, 1235, 1236
1724, 1063–64
1725, 1061–63
1730, 1003
1735, 1003, 1004
1737, 1281–82
Sentencing and sentences
life imprisonment of juveniles, 366–69
Serving Criminal Sentences Abroad, Inter-American Convention on, 104
Separation of powers. *See also* President, U.S.
presidential reservation of constitutional prerogatives in signing legislation. signing statements, 305–7, 402, 536–37, 1286–87
Serbia
U.S. military assistance, 278

Service of process abroad
Hague Convention on (1965), unknown address of party to be served, 971, 972
indirect service on visiting foreign officials as agents for foreign defendant, 681–82
inviolability to, head-of-state, 681–82
by publication in newspaper, 970–73
Sexual abuse and violence
UN peacekeepers committing, 1065–68
Shrimp imports. *See* Fish and marine mammals, *subheading:* sea turtle protection
Sierra Leone
Special Court for, 256–57, 275–77
Singapore
free trade agreement, 766*n*
immunity, Singapore State Immunity Act, 609
Straits of Malacca and Singapore, 806–10
Slovak Republic
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 137, 147
intellectual property rights, 769
Slovenia
EU accession and trade agreements, 754–56
extradition and mutual legal assistance, 137, 147
Smuggling of persons. *See* Trafficking in persons
Somalia
Security Council resolutions, 1061–64
South Africa
child support enforcement, 943–44
consular notification cooperation with U.S., 88–89
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Sovereign immunity. *See also* Foreign Sovereign Immunities Act (FSIA) (1976); Immunity; Sovereignty
of Canadian power utility, 550–58
Canadian State Immunity Act, 609
European Convention on State Immunity, 599, 603, 607
of individuals sued in their official capacity under federal common law, 629–52
New York Passport Agency, 307
passport-related, 307
Singapore State Immunity Act, 609
UK State Immunity Act, 609, 641

Sovereign immunity (continued)
UN Convention on Jurisdictional Immunities of States and Their Properties, 599–600, 603, 607–9
Sovereignty
of Native American tribes, 353*n*
Soviet Union
judicial assistance, 108
Space
international cooperation, 845–47
International Mobile Satellite Organization (IMSO), 494–97, 838
registration of outer space objects, 849–51
threats to U.S. space assets, 843–45
UN Committee on Peaceful Uses of Outer Space (COPUOS), 847–51
UN Outer Space Treaty, 932–34
U.S. national space policy, 840–47
U.S. space program activities, 847–49
Spain
extradition and mutual legal assistance, 138, 147
Hague Child Abduction Convention, compliance with, 102
Special Missions, Convention on, 676–77
Special missions immunity, 675–80
Sri Lanka
passport, request for replacement when U.S. citizen arrested for alleged involvement with terrorist group in, 16–17
Standing
of shareholders and corporations, 501
START treaty. *See* Strategic Arms Reduction Treaty (START)
State Department Authorities Act (2006), 210–11
State responsibility. *See also* Alien Tort Statute (ATS); Expropriation; Foreign Sovereign Immunities Act (FSIA) (1976); North American Free Trade Agreement (NAFTA)
diplomatic protection, 499–502
International Law Commission draft articles on, 645*n*
terrorists, preventing from launching attacks outside own territory, 1109–10
Stateless Persons, Convention on (1954), 1–2
Statelessness, Convention on Reduction of (1961), 1–2
Statute of limitations
Carriage of Goods by Sea Act, 918–28
disappearances, draft convention on, 427
national security issues in foreign investment in U.S., none, 778
in Torture Victims Protection Act, 431
treaty rights suits against U.S. by Native Americans, 352
in U.S. Court of Claims, 324

Strategic Arms Reduction Treaty (START), 1251–55.
Joint Compliance and Inspection Commission
site diagram change for inspectable facility, 1251–55
Trident II SLBM warheads, 1251, 1254–55
U.S compliance, 1263
Submerged lands, disputes as to sovereignty over
Northern Mariana Islands, Commonwealth of (CNMI), 315–16
Sudan
African Union Mission, 1043, 1044, 1046
Alien Tort Statute (ATS) issues, 460–65
child soldiers, 387, 388
Comprehensive Peace Agreement, 978–79
Darfur Peace Agreement, signing of, 1042–54
peacekeeping efforts, 1043–54
religious freedom violations, 377
sanctions on, 975–83
terrorist bombings of African embassies, private suit against for support of, 578–81
trafficking in persons, 229
UN Security Council Resolution 1590, 1047
Suspension Clause, 1177, 1180–82
Sweden
EU accession and trade agreements, 755–56
extradition and mutual legal assistance, 138, 147
U.S. vessels not violating Swedish territorial waters, 812–14
Switzerland
Hague Child Abduction Convention, compliance with, 102
trade and investment issues, 761
Syria
biological weapons, 1240
Lebanon and, 1036*n*
Hariri murder and, 984–85
terrorism support in, 1037, 1039–41, 1226–30, 1233–34
removal to for purpose of interrogation under torture, 484–85
sanctions on, 243–49, 984–86
terrorism, noncooperation with US. efforts against, 172
trafficking in persons, 228

T
Taiwan
intellectual property rights Watch List, 768
passport giving as place of birth, 545, 546

Taiwan Relations Act (1979), 545–46
Tajikistan
intellectual property rights Watch List, 768
Takings of property. *See also* Expropriation
Cuban litigation over denial of trademark, 1007, 1013–15
nuclear testing by U.S. in Marshall Islands, 324
Taliban
in definition of enemy combatant, 1040*n*
Geneva Conventions applying to, 1134
sanctions against, 1000, 1002–3, 1005
U.S. use of force against, 1106–10, 1111, 1121, 1139, 1152
Tanzania
Al Qaeda attack on U.S. embassy in, legal action related to, 578–81
U.S. military assistance, 278
waiver of Article 98 agreement with U.S. (nonsurrender of Americans to ICC), 279
Telecommunications. *See* International Telecommunications Union (ITU); Internet
Territorial sea. *See* Maritime issues
Terrorism. *See also* Al-Qaida/Qaeda; Detainees, military; Taliban
airline passenger name record data, access to, 168–72
bombings of U.S. embassies in Africa, 578–81
constitutionality of U.S. antiterrorism statutes, 180-99
countries not fully cooperating with antiterrorism efforts, designation of, 172
country reports on, Department of State, 167–68
definition, 355–56
of terrorist activity, 356
designation of foreign terrorist organizations by U.S. (FTOs), 180–99, 204–6, 1000–1006
delisting procedures of UN, 1000–1006
litigation concerning, 180–99
Executive Order 13224, 183–91, 205–6
extradition and, 122–27
financing of, statements to UN Security Council 1267 sanctions committee on, 1000
human rights, protection of while countering, 487–88
immigration laws of U.S. and
exclusion of aliens, 206–10
visa denial for terrorist activity, 18–29
incitement to commit acts of, 200–210
International Civil and Political Rights Convention, no derogation from after 9/11, 412
International Maritime Convention, Athens Protocol, 292–94

Terrorism (continued)
National Counterterrorism Center (NCTC), 167
Nuclear Terrorism, Global Initiative to Combat, 1293–96
Palestinian Anti-Terrorism Act (2006), 306, 993–95
passport, request for replacement when U.S. citizen arrested for alleged involvement with terrorist group in, 16–17
sanctions related to prohibition of transfer of air defense systems to states or groups, 210–11
state sponsors of, 173–80, 582
Terrorist Bombings Convention, reservations to, 288–91
UN Security Council committees on
Counter-Terrorism Committee (CTC), 999–1000
review of 1267, 1373 and 1540 committees, 1002–3
1267 sanctions committee, statements to, 1000
UN Security Council Resolution 1624, U.S. report pursuant to, 199–210
Thailand
intellectual property rights Watch List, 769
Tobago. *See* Trinidad and Tobago
Torture. *See also* Detainees, military
Committee against, U.S. reports to, 421, 1119, 1124–37
Committee conclusions and recommendations, U.S. observations on, 403–9
Convention against (UN 1984)
definition, 409–11, 1132
implementation by U.S., 357, 403–21
criminal prohibition and jurisdiction, 416–17, 1159
legal opinion on, Department of Justice, 409–11, 1132
reservations, 419
territorial scope, 413, 419–20
not prohibiting all incommunicado detention, 1122
optional protocol to, 421
cruel, inhuman or degrading treatment, 401–22, 1126–27, 1130, 1173–74
interrogation and, 1130, 1173–77
McCain Amendment, 402
Military Commissions Act (2006) and, 1171–77
no authority to authorize torture, 1128–29
Torture Victims Protection Act (TVPA), 479–85
color of law, 484–85
exhaustion of local remedies and, 482–84
extrajudicial killing, 479–82, 485

Torture (continued)
Torture Victims Protection Act (TVPA) (continued)
immunity of government official to claims under, 629, 650–52, 681*n*
state action requirement, 485
transfers to other countries and likelihood of, 416
extradition, 157–59
"more likely than not" standard, 416
nonrefoulement
detainees suspected as terrorists, 356–60, 413
role of diplomatic assurances, 415–16, 421–22
rendition, 358–59, 414–16
Trade. *See also* Arms control; North American Free Trade Agreement (NAFTA); Sanctions; World Trade Organization (WTO); *specific countries*
agriculture. *See* Agricultural policy and trade
cement trade, U.S.–Mexico agreement, 758–59
coffee, 493–94
diamonds, 1060
electronic commerce. *See* Electronic commerce
Export Administration Regulations (EAR), 177–80, 1300–1301
free trade agreements, 763–69
Bahrain–U.S., 765
Colombia–U.S., 764–65
Dominican Republic-Central American Free Trade Agreement (CAFTA-DR), 764
Oman–U.S., 765
Panama–U.S., 765
Hazardous Waste, Basel Convention on the Control of Transboundary Movements of, 863–65
intellectual property. *See* Intellectual property rights
investment, trade and, instruments, 759–62
Iraq, U.S. policy toward, 177, 179–80
Libya, easing of restrictions on, 177–79
most-favored-nation status, 755
NAFTA. *See* North American Free Trade Agreement (NAFTA)
Omnibus Trade and Competitiveness Act (1988), 767
softwood lumber agreement with Canada, 762–63
Special 301 program (intellectual property), 767
tequila trade, U.S.–Mexico agreement, 757–58
Ukraine, 746–48
UNCITRAL Model Law on Electronic Commerce, 934–36
wildlife, restrictions on trade in, 888
wine-making practices and labeling, 757

Trademark law
Cuban litigation in U.S., 796–801, 1006–15
Trafficking
in drugs. *See* Drug trade
in persons. *See* Trafficking in persons
in weapons. *See* Arms control; *specific types of weapons*
in wildlife, 888
Trafficking in persons, 226–29
children as trafficking victims, protection of children, 226, 227, 374, 384–85
Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), 838–40
State Department report on foreign governments' efforts (TIP report), 226–27
Trafficking Victims Protection Reauthorization Act (2003), 227
Trafficking Victims Protection Reauthorization Act (2005), 1066
Victims of Trafficking and Violence Protection Act (TVPA) (2000)
Iran's liability for judgments awarded under, 615–19
Presidential Determination on countries' performance, 227–29
women as trafficking victims, protection of women, 374
Transfer of prisoners. *See* Prisoner transfer
Travel restrictions
related to Iraq, 1015–19
Treaties, generally. *See also* Memoranda of understanding; *specific topics and countries*
armed conflict, effect of on, 295–98
capacity to enter into, 281–82
Case Act and, 295
implementation in armed conflict, 295–98
Military Commissions Act (2006) and, 1170–74
private right of action under, 84–85
reservations, 288–92
collective reservation as substitute for amendment, 292–94
International Law Commission on, 294–95
travaux preparatoires, role in interpretation of, 287–88
unilateral acts of states, 281–83
U.S. policies on entering into treaties, 283–84
U.S. Treaty Affairs Regulations, 295–97
Webpage of Office of Treaty Affairs, 298
Trinidad and Tobago
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
Truth, right to
UN Commission on Human Rights (UNCHR) Resolution 2005/66, 425

Turkey
Hague Child Abduction Convention, compliance with, 102
intellectual property rights Watch List, 768
Nuclear Terrorism, Global Initiative to Combat, 1295–96
WTO dispute over rice importation, 742
Turkmenistan
intellectual property rights Watch List, 769

U
UCMJ. *See* Uniform Code of Military Justice (UCMJ)
Uganda
child soldiers in, 387, 389
Ukraine
accession to WTO, 745–46
asylum seekers returned to Uzbekistan by, 60–61
intellectual property rights Watch List, 768, 769
U.S.–Ukraine trade relations, 746–48
UN Commission on Human Rights
The Commission was replaced by the UN Human Rights Council in 2006.
truth, right to, 425
UN Human Rights Council, 328–43
composition of, 332
creation of, 328
history of, 331
membership criteria for, 331–32
Peer Review Working Group, 341
procedure of, 332–33, 341–43
religious freedom, 380–81
special sessions, 335–41. *See also specific countries*
trafficking in children, 384–85
universal periodic review, 341
U.S. not seeking election to, 328
U.S. support for, 329–30
violence against women, report on, 374–75
UNCAC (UN Convention against Corruption), 229–33
UNCITRAL (UN Commission on International Trade Law)
Model Law on Electronic Commerce, 934–36
UNESCO (Educational, Scientific, and Cultural Organization)
Protection and Promotion of Diversity of Cultural Expressions, adoption of Convention on, 284
UNIDROIT (International Institute for the Unification of Private Law)
on interests in mobile equipment, 930–34

Uniform Code of Military Justice (UCMJ)
military commissions as violating, 1138–55
penalizing torture and other mistreatment, 417, 420
Unilateral acts
of states, International Law Commission report on, 281–82
United Arab Emirates
Dubai Ports World proposal to acquire U.S. ports, 774–80
United Kingdom
arms control and nonproliferation
Iran weapons program and, 1276–78
nuclear fuel, assurances of reliable access to, 1292–93
Nuclear Terrorism, Global Initiative to Combat, 1295–96
counterterrorism recommendations, 210
customary international law, law of war, 1078–82
extradition and mutual legal assistance, 136, 138, 147
extradition treaty with U.S. (2004), 111–27
territories covered by, 136, 138, 147
immunity issues
sovereign immunity, 672
UK State Immunity Act, 609
special mission immunity, 672
Pan Am 103 shootdown over Lockerbie, Scotland, 174–75
Sudan, assistance in, 1051
Titanic protection agreement, 828–35
United Nations
Charter of (1945)
Articles
40, 1278
41, 1268, 1277–81
51, 1108–9, 1256
Chapter VII, 263, 275, 331, 975, 1043, 1047, 1060, 1063–64, 1235, 1268, 1269, 1277–82
Commission on Narcotic Drugs, Resolution 49/3, on methamphetamine, 217–20
Corruption, Convention against (UNCAC), 229–33
Counter-Terrorism Committee (CTC), 199–210, 999–1000
counterterrorism obligations, U.S. reports on implementation of, 199–210
disabilities convention
adoption of, 383
U.S. as nonparty to, 284
U.S. views on draft, 382–84
Environment Program (UNEP), 865
Food and Agriculture Organization. *See* Agricultural policy and trade, *subheading:* UN Food and Agriculture Organization

United Nations (continued)
Freedom of Opinion and Expression, Special Rapporteur on, 486–87
immunity of missions to, 592–603
inviolability
of missions to, 681–82
of officials attending UN conference, 681–82
Middle East, role in conflict resolution. *See* Middle East Conflict, Israeli-Palestinian, *subheading:* Quartet (EU, Russia, UN, U.S.) peace efforts
peacekeeping role
Darfur, 1046–47, 1048–50
sexual exploitation and abuse at hands of UN peacekeepers, 1065–68
UNIFIL (Lebanon), 1035, 1037, 1039, 1060–61
reform of, 489–90
United Nations Participation Act (1945), 975, 1017
women's issues
advancement of women, 373–74
UN Development Fund for Women (UNIFEM), 372–73
Uruguay
bilateral investment treaty, 790–96
intellectual property rights, 769
Inter-American Convention Against Corruption, party to, 238
U.S. military assistance, 278
Uruguay Round, 767
Use of force. *See* Armed conflict; Conventional weapons; Geneva Conventions on law of war (1949); Law of war
Uzbekistan
asylum seekers returned to Uzbekistan by Ukraine, 60–61
intellectual property rights Watch List, 769
religious freedom in, 377, 378
trafficking in persons, 229

V
Vatican
immunity, 684
VCCR. *See* Consular Relations, Vienna Convention on (VCCR)
Venezuela
drug trade, 212–13
illicit drug production or transit, 213
Hague Child Abduction Convention, compliance with, 101
intellectual property rights Watch List, 768
Inter-American Convention Against Corruption, party to, 238
terrorism and, noncooperation with antiterrorism efforts, 172
trafficking in persons sanctions, 228

Vessels. *See* Maritime issues
Vienna Convention on Law of Treaties (VCLT) (1969)
as customary international law, 287, 291, 392
on fundamental change in circumstances, 282
on interpretation of treaty, 348, 695, 816, 1260–61
travaux préparatoires, 287–88
jus cogens and, 647*n*
Articles:
21, 291
31, 695
32, 287
62, 282
Vietnam
accession process to WTO, 748–50
Agent Orange litigation, 522–26
intellectual property rights Watch List, 769
religious freedom, 377–78
U.S. refugee policy, 56
U.S. trade agreement with, 748–50
Violent Crime Control and Law Enforcement Act (1994), 418
Visas. *See* Immigration and visas

W
War crimes. *See also* Customary international law; Detainees, military; Geneva Conventions on law of war (1949); International Criminal Tribunal for Former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); Law of war; Military commissions for trial of certain non-U.S. enemy combatants
Agent Orange litigation, 522–26
specific conflicts and areas
Iraq, 269
Sierra Leone, 276–77
universal jurisdiction over, 1085
War Crimes Act, 474–75, 650, 1162, 1171–74, 1176
War on terror. *See also* Detainees, military; Geneva Conventions on law of war (1949); Law of war; Terrorism
"global war on terrorism," meaning of, 1108–9
legal standards applicable to, 1104–17
Wassenaar Arrangement, 1300–1301
Waste disposal. *See* Environmental issues
Water pollution. *See* Environmental issues
Weapons of mass destruction (WMDs)
Executive Order 13382, 1297
nonproliferation programs. *See* Nonproliferation

Western Hemisphere Travel Initiative, 4–11
Western Sahara
peacekeeping missions and, 1064–65
Whaling. *See* Fish and marine mammals
WHO. *See* World Health Organization (WHO)
Wildlife
illegal trade in wildlife and wildlife parts, 888
Wine
EU–U.S. trade agreement on wine-making and labeling, 757
Women's issues
advancement of women, 373–74
discrimination, 372–76
rape and sexual violence as war crime or crime against humanity, 420
UN Development Fund for Women (UNIFEM), 372–73
violence against women, 374–76
World Health Organization (WHO)
International Health Regulations, 891–92
pandemic influenza, strategy for, 889–90
World Trade Organization (WTO), 737–54
accession to
Russia, 751–52
Ukraine, 745–48
Vietnam, 748–50
agricultural policy and trade, 687, 737–39, 742, 753–54
Antidumping Agreement, 743–44
dispute resolution, 737–45
brought against U.S., 743–61
antidumping measures, "zeroing" in dumping calculations (Japan), 743–44
Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), 707
softwood lumber from Canada, 745
brought by U.S., 737–42
China: automobile parts, 741–42
European Union: biotech approvals, 737–39
European Union: customs administration, 739–40
Turkey: rice imports, 742
Doha declarations, agricultural policy and trade, 753–54
Doha round of negotiations, 687
suspension of, 753–54
World War II
claims
against Albania, 502–3
Foundation Agreement (German) compensation and restitution for, 507–24

World War II (continued)
claims (continued)
against French banks, 504–7
against Germany and German companies, 507–17
compensation from Foundation precluding litigation, 517–24
interest dispute over German company contributions, 507–17
nonjusticiable political question and, 507–17
WTO. *See* World Trade Organization (WTO)

Z
Zimbabwe
head-of-state and diplomatic immunity of government officials, 681–82
inviolability of government officials for service of process, 681–82
money laundering, 243
trafficking in persons, 228